TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 948.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 7, 1899.

(17,457.)



(17,457.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 343.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 7, 1900.

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1 THE COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 20th day of May, A. D. 1899.

Present: Chief Justice Hazelrigg and Judges Thos. H. Paynter, A. R. Burnam, B. L. D. Guffy, George Durelle, J. D. White, and J. P. Hobson.

LOUISVILLE AND NASHVILLE RAILROAD Company, Appellant, *vs.* THE COMMONWEALTH OF KENTUCKY, Appellee. } (No. 505.) Appeal from Marion Circuit Court.

Be it remembered that heretofore, to wit, on the 18th day of March, A. D. 1899, the appellant, by counsel, filed in the office of the clerk of the court of appeals of Kentucky a transcript of a record in words and figures following, to wit:

2 Pleas had before the Hon. Chas. Patteson, judge of the eleventh judicial district of Kentucky, at the court-house, in Lebanon, Marion county, Kentucky, on the 25th day of January, 1899, on a trial of indictment No. 505, cause pending in said Marion circuit court, in which The Commonwealth of Kentucky is plaintiff and The Louisville and Nashville Railroad Company is defendant.

Marion Circuit Court, January Term, 14th Day.

12TH DAY OF FEB., 1895.

This day came the grand jury of Marion county, Kentucky, and by its foreman, in the presence of said grand jury, returned the following indictment into open court, endorsed a "true bill," Commonwealth of Kentucky *vs.* The Louisville & Nashville Railroad Company, which is ordered to be filed, and it is ordered that summons on this indictment be issued:

Marion Circuit Court, January Term, A. D. 1895.

THE COMMONWEALTH OF KENTUCKY *against* THE LOUISVILLE & NASHVILLE R. R. Co. } Indictment for Charging More for a Short than a Longer Haul.

3 The grand jury of the county of Marion, in the name and by the authority of the Commonwealth of Kentucky and upon the recommendation of the State railroad commission filed in said court, accuse the Louisville & Nashville Railroad Company of the offense of charging more for a short than for a longer haul, the shorter being included within the longer distance, committed in

manner and form as follows, to wit: The said Louisville and Nashville Railroad Company is now and was on the 17th day of October, 1894, a corporation organized under the laws of this State and a common carrier of freights, operating in this State a line of railroad extending from Altamont, in said State, through the said county of Marion and city of Lebanon to Louisville, in said State, and on said 17th day of October, 1894, before the finding of the indictment herein, the said Louisville & Nashville railroad, in said county of Marion, did transport a car-load of coal from said Altamont to Lebanon, Kentucky, over its said line of road for J. M. Shreve, and did then and there unlawfully charge and receive from the said J. M. Shreve as compensation for the transportation of said car-load of coal twenty-nine and $\frac{14}{100}$ dollars, being at the rate of $1.55 per ton, when for the transportation of similar car-loads of coal under similar circumstances and conditions for a longer distance over the same line of road, namely, from Altamont, Kentucky, to Louisville, Kentucky, and to Elizabethtown, Kentucky, in the same direction, the distance from Altamont, Kentucky, to Lebanon, Ky., being shorter and included within the longer
4 distance, from Altamont, Kentucky, to Louisville, Kentucky, and to Elizabethtown, Kentucky, the said defendant at said time did charge and receive less compensation than $1.55 per ton from various persons at said Louisville, Kentucky, and Elizabethtown, Kentucky, the defendant at said time not having been authorized by the railroad commission of this Commonwealth to charge less for longer than for shorter distances for the transportation of coal, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the Commonwealth of Kentucky.

H. W. RIVES,
Pro Tem. Commonwealth's Attorney, Eleventh Judicial District.

Witness-:
J. M. SHREVE.
FRANK HARRIS.

COMMONWEALTH OF KENTUCKY
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.
} #505. Indictment for Excessive Freights.

A true bill.

PAUL I. McELROY,
Foreman of the Grand Jury.

1895, February 12th.—Received from the foreman of the grand jury in the presence of the grand jury, and filed in open court.

B. J. LANCASTER,
Clerk M. C. C.,
By HARRY LANCASTER, *D. C.*

5 Marion Circuit Court, April Term, 3rd Day.

24TH DAY OF APRIL, 1895.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order Setting Case for Trial.

This day came parties, by attorneys, and by agreement this cause is set for trial on the 8th day of May, 1895, and the fifteenth term day of the present term of court.

Marion Circuit Court, Special August Term, 10th Term Day.

16TH DAY OF AUGUST, 1895.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order of Continuance.

This day came parties, by attorneys, and by agreement the above-styled action is continued until the next term of this court.

Marion Circuit Court, September Term, 2nd Day.

24TH DAY OF SEPTEMBER, 1895.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order of Continuance.

This day came parties, by attorneys, and by agreement this cause is continued until the next term of this court.

6 Marion Circuit Court, January Term, 2nd Day.

28TH DAY OF JANUARY, 1896.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company. } Order of Continuance.

This day came parties, by attorneys, and by agreement this cause is continued.

Marion Circuit Court, April Term, 1st Day.

27TH DAY OF APRIL, 1896.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company. } Order of Continuance.

This day came the Commonwealth, by attorney, and on his motion this cause is continued.

Marion Circuit Court, September Term, 2nd Day.

29TH DAY OF SEPTEMBER, 1896.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order of Continuance.

This day came the Commonwealth of Kentucky, by attorney, and on his motion this cause is continued.

7 Marion Circuit Court, January Term, 1st Day.

25TH DAY OF JANUARY, 1897.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order of Continuance.

This day came parties, by attorneys, and by agreement this cause is continued.

Marion Circuit Court, January Term, 10th Day.

4TH DAY OF FEBRUARY, 1897.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company. } Order Setting Former Order Aside.

This day came the Commonwealth of Kentucky, by attorney, and on his motion the order made at a former day of this term continuing this cause is set aside and held for naught, and on his further motion this cause is set for trial on the 9th day of the next April term of this court, to which time said cause is continued.

Marion Circuit Court, September Term, 1st Day.

27TH DAY OF SEPTEMBER, 1897.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHGILLE RAILROAD Company. } Order of Continuance.

8 This day came parties, by attorneys, and by agreement this cause is continued.

Marion Circuit Court, Special December Term, 1st Day.

6TH DAY OF DEC., 1897.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order of Continuance.

This day came parties, by attorneys, and by agreement this cause is continued until January term of this court.

Marion Circuit Court, January Term, 4th Day.

27TH DAY OF JANUARY, 1898.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order Overruling Motion for Continuance.

This day came the defendant, by its attorneys, and produced an affidavit, properly verified, which was ordered to be filed, and moved the court to continue this case, and the court, being advised, overruled the motion, to which defendant excepted, and the said cause is set for trial on the 14th day of the present term, and alias subpœnas are ordered to issue for the Commonwealth witnesses and for C. C. McChord in Franklin county, Kentucky, in this case, to which defendant excepted.

9 Marion Circuit Court, January Term, 20th Day.

15TH DAY OF FEBRUARY, 1898.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company. } Order Overruling Motion to Elect.

This day came parties by attorneys, and the defendant entered a general demurrer to the indictment herein, and the court, being advised, overruled the demurrer; to which defendant, by its attorneys, objected and excepted.

Then came the defendant and filed its written motion requiring the Commonwealth to elect whether it will prosecute the defendant for the alleged offense of charging more for hauling from Altamont to Lebanon than from Altamont to Elizabethtown or for the alleged offense of charging more for hauling from Altamont to Lebanon than from Altamont to Louisville, and the court, being advised on said motion, overruled same, to which the defendant excepted and entered a plea of not guilty. Then came the following jury, T. M. Clark, W. T. Cook, William Hayden, J. B. Hundley, T. B. Mattingly, G. W. McElroy, Sim O'Daniel, Richard Smith, Prior Swiggert, W. W. Thomas, W. H. Thurman, and R. L. Weatherford, who were duly sworn to try the issue, and, not having time to complete the trial, were adjourned by the court till tomorrow morning at eight o'clock.

10 Marion Circuit Court, January Term, 21st Day.

16TH DAY OF FEBRUARY, 1898.

Court met pursuant to adjournment, Hon. Charles Patteson, circuit court judge, being present.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE R. R. COMPANY.

This day came parties, by attorneys, and thereupon came T. M. Clark and eleven others, the jury heretofore empaneled and sworn to try the issue, and at the close of plaintiff's testimony the defendant, by its attorney, moved the court to instruct the jury to find for the defendant, and the court, being sufficiently advised, overruled the motion; to which the defendant, by its attorneys, objected and excepted, and, not having time to complete the trial, the jury was duly admonished by the court and adjourned until tomorrow morning at 8 o'clock.

Marion Circuit Court, January Term, 22nd Day.

17TH DAY OF FEBRUARY, 1899.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

This day came parties, by attorneys, and thereupon came T. M. Clark and eleven others, the jury heretofore empaneled and
11 sworn to try the issue, and, not having time to complete the trial, were duly admonished by the court and adjourned until tomorrow morning at 8 o'clock.

Marion Circuit Court, January Term, 23rd Day.

18TH DAY OF FEBRUARY, 1898.

Court met pursuant to adjournment, Hon. Chas. Patteson, circuit court judge, being present.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

This day came parties, by attorneys, and thereupon came T. M. Clark and eleven others, the jury heretofore empaneled and sworn to try the issue, and at the close of all the testimony the defendant renewed its motion to the court to instruct the jury to find for the defendant, and the court, being advised, overruled the motion; to which the defendant, by its attorneys, objected and excepted, and after hearing all the evidence, argument of counsel, and receiving the instructions of the court, retired and returned into court and announced to the court that they had and could not agree upon a verdict. Thereupon the court discharged the jury from further consideration of the case, and the cause was continued.

12 Marion Circuit Court, April Term, 2nd Day.

26TH DAY OF APRIL, 1898.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } Order of Continuance.

This day came parties, by attorneys, and on their motion this cause is continued.

Marion Circuit Court, January Term, 2nd Day.

24TH DAY OF JANUARY, 1899.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } Order Empaneling Jury.

This day came parties, by attorneys, and the defendant entered a plea of not guilty, and thereupon came the following jury: John R. Johnson, J. M. Cissell, R. C. Miburn, J. W. Helm, B. F. Abell, E. M. Roney, A. Q. Hardesty, John Harrison, Maurice Doody, Jr., J. C. Jarboe, G. W. Raley, and J. A. Wayne, who were duly sworn to try the issue, and, not having time to complete the trial, were adjourned until tomorrow morning at 9 o'clock.

Marion Circuit Court, January Term, 3rd Day.

25TH DAY OF JANUARY, 1899.

Court met pursuant to adjournment, Hon. Chas. Patteson being present.

13 Circuit court judge being present.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } Judgment.

This day came parties, by attorneys, and thereupon came M. Doody, Jr., and eleven others, the jury heretofore empaneled and sworn to try the issue, and after hearing the evidence, argument of counsel, and receiving the instructions of the court, retired and returned into the court the following verdict: "We, of the jury, find the defendant guilty and fix the fine at three hundred dollars ($300.00). M. Doody, Jr., one of the jury." It is therefore adjudged that the Commonwealth recover of the defendant the sum of three hundred dollars and its costs herein expended, for which execution may issue. (See page 152, bill of exceptions, copy of same verdict and judgment.—Clerk.)

Marion Circuit Court, January Term, 5th Day.

27TH DAY OF JANUARY, 1899.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } Order Filing Grounds for New Trial.

Came defendant, by its attorneys, and filed written motion and grounds for new trial herein and moved the court to set aside the verdict and judgment herein and grant a new trial, and, to be advised, the court took time.

14 Marion Circuit Court.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company. } Motion and Grounds for New Trial. (Indictment # 505.)

The defendant moves the court to set aside the verdict and judgment herein against it, and to grant it a new trial herein, and for grounds of said motion says:

1. That the court erred in sustaining the objection of the Commonwealth to each of the 4th, 5th, and 15th questions propounded by the defendant to the witness S. R. Knott, and in refusing to permit said witness to answer said questions or any of them, and in so doing the court, with respect to each of said questions and each of said answers, decided against the right and immunity then

and there specially set up and claimed by the defendant at the time of the propounding of each of said questions, under section 1 of article 14 of the amendments to the Constitution of the United States and under subsection 1 of section 10 of article 1 of the Constitution of the United States.

2. That the court erred in sustaining the objection of the Commonwealth to the 6th question propounded by the defendant to the witness S. R. Knott, and in refusing to permit said witness to answer said question, and thereby the court decided against
15 right and immunity then and there specially set up and claimed by the defendant under subsection 3 of section 8 of article 1 of the Constitution of the United States and under the act of Congress of Feb'y 4th, 1887, entitled "An act to regulate commerce."

3. That the court erred in sustaining the objection of the Commonwealth to each of the 7th, 8th, 9th, 10th, 12th, 13th, and 14th questions propounded by the defendant to the witness S. R. Knott and in refusing to permit said witness to answer said questions or any of them.

4. That the court erred in sustaining the objection of the Commonwealth to each of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th questions propounded by the defendant to the witness J. B. Atkinson and in refusing to permit said witness to answer said questions or any of them.

5. That the court erred in sustaining the objection of the Commonwealth to each of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, and 13th questions propounded by the defendant to the witness W. A. Pugh and in refusing to permit said witness to answer said questions or any of them.

6. That the court erred in sustaining the objection of the Commonwealth to each of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th questions propounded by the defendant to the witness C. S. Nield and in refusing to permit said witness to answer said question- or any of them.

16 7. Because the court erred at the conclusion of the testimony for the Commonwealth in refusing to instruct the jury peremptorily to find for the defendant, as requested by the defendant.

8. Because the court erred in refusing at the conclusion of all the evidence to instruct the jury peremptorily to find for the defendant, as requested by the defendant, and in so doing the court decided against the defendant's contention that section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes were void because in conflict with section 1 of article 14 of the amendments to the Constitution of the United States, and subsection 1 of section 10 of article 1 of the Constitution of the United States, and subsection 3 of section 8 of article 1 of the Constitution of the United States, and the act of Congress of February 4th, 1887, entitled "An act to regulate commerce," and decided in favor of the validity of said section 218 of the constitution of Kentucky and of section 820 of the Kentucky Statutes.

9. Because the court erred in giving to the jury, on motion of the Commonwealth, instructions numbered 1 and 3 and each of them, and erred in not instructing the jury properly as to the whole law of the case.

10. Because the verdict is against the law.

11. Because the verdict and judgment are based upon a construction of the law of Kentucky which necessarily makes that
17 law contrary to section 1 of article 14 of the amendments to the Constitution of the United States, and subsection 1 of section 10 of article 1 of the Constitution of the United States, and subsection 3 of section 8 of article 1 of the Constitution of the United States, and in conflict with the act of Congress of February 4th, 1897, entitled "An act to regulate commerce."

W. J. LISLE,
W. C. McCHORD,
WALKER D. HINES,
Attorneys for Def't.

Filed in court January 27th, 1899.

B. J. LANCASTER, *Clerk.*

Marion Circuit Court, January Term, 11th Day.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order Overruling Grounds for New Trial, Granting an Appeal, Filing Bill of Exceptions.

3RD DAY OF FEBRUARY, 1899.

The court, being advised, overruled the motion and grounds for new trial filed herein on a former day of this term, to which defendant excepted and prayed an appeal from the judgment herein to the court of appeals, which is granted upon the condition that the record be lodged in the clerk's office of the court of appeals within sixty days after the judgment. Thereupon defendant tendered herein its bill of exceptions, which was examined and approved and signed by the judge and is hereby filed and made part of the record.

18 Marion Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.
Indictment. No. 505.

Bill of Exceptions.

LEBANON, KY., *January 24th*, 1899.

Be it remembered that, this cause coming on this day for trial, the jury was duly impaneled and sworn, the case was stated by

counsel for the Commonwealth to the jury, and the defendant entered a plea of not guilty.

The court thereupon adjourned.

LEBANON, KY., *January 25th*, 1899.

The court met pursuant to the adjournment.

Counsel for the Commonwealth thereupon offered in evidence certain reports of the railroad commission of Kentucky to the Marion circuit court.

To the introduction of said reports in evidence the defendant, by counsel, objected. The court overruled said objection; to which the defendant, by counsel, excepted.

Counsel for the Commonwealth thereupon read said reports in evidence to the jury in words and figures as follows, to wit:

"OFFICE OF RAILROAD COMMISSIONERS,
FRANKFORT, KY., *Dec'r 5th*, 1894.

Board met pursuant to call of the chairman.

19 Present: C. C. McChord, chairman; Chas. B. Poyntz, Urey Woodson.

At a meeting of the commission held the following order was made and entered, viz:

Complaint having heretofore been made to this board of railroad commissioners by the Commercial Club of Lebanon, Kentucky, against the Louisville and Nashville Railroad Company, charging said company with violating and continuing to violate section 218 of the constitution of Kentucky and 280 of the Kentucky Statutes in the matter of charging and receiving a greater compensation in the aggregate per ton for the transportation of coal by said company originating from the various coal mines upon the Knoxville branch and connecting branches of said railroad in Kentucky to Lebanon, Kentucky, than is charged and received by said company on a like commodity originating at or from said points and transported over the same line to Louisville, Kentucky, a greater distance, the shorter being included in the longer distance, and the commission, having invested said complaint and being now advised, find that said complaint is well taken; that said facts are true, and therefore declines and refuses to exonerate said company from the provisions of said sections of said Constitution and statute and from said acts, and now orders that said company desist and refrain from charging, collecting, or receiving a greater sum

20 in the aggregate per ton on said Knoxville branch and connecting branches of said company's road upon all shipments of coal to Lebanon, Kentucky, from said mines than it charges, collects, or receives for a like commodity originating at or from said mines and transported over said line to Louisville, Kentucky. The commission reserve the right to suspend the operation of this order should said company reduce its rates on said commodity from said points of shipment to Lebanon, Ky., such reduced rates to be approved by this board.

It is further ordered that a copy of this order be mailed to said company and said complainant.

C. C. McCHORD, *Chairman.*
UREY WOODSON.
CHAS. B. POYNTZ."

To the reading of said report in evidence to the jury the defendant, by counsel, objected. The court overruled said objection; to which the defendant, by counsel. excepted.

Counsel for the Commonwealth thereupon offered in evidence an additional report of said railroad commission.

To the introduction in evidence of said additional report the defendant, by counsel, excepted.

By the COURT: There might be part of that that I would sustain an objection to, and part I would overrule. There are three classes of indictments against the defendant: One for extortion, one for discrimination, and long and short haul. Some of those are probably embraced in that report. I don't presume you offer as evidence any report in regard to extortion, which has been disposed of.

By Mr. SWEENY: No, sir; I only want to offer this report so far as it is applicable to this long and short haul.

21 To the ruling of the court in permitting any part of said report to be read in evidence to the jury the defendant, by counsel, excepted.

Counsel for the Commonwealth thereupon read from said report in evidence to the jury as follows:

"To the Marion circuit court and to the grand jury of said county and court:

The railroad commission of the State of Kentucky, by virtue of the authority vested in them by the laws of Kentucky and in compliance with their duties as such, in addition to the information, recommendation, or report heretofore filed in this court on a former day of this term, hereby tender and file in this honorable court further information, report, and recommendation to the present grand jury now in session, in addition and by way of amendment to their said original information, report, or recommendation heretofore filed herein, the following information, accusation, or recommendation to said grand jury and to this honorable court, to wit:

Said commission further charge and accuse the said railroad company of having violated section 820 of the Kentucky Statutes, and also section No. 218 of the present constitution of the State of Kentucky, by charging, collecting, demanding, or receiving a greater compensation in the aggregate for the transportation of property of like kind, under substantially similar circumstances and

22 conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance. The said railroad commission having refused to exonerate or permit the said railroad company to charge more for said service as set out in the original accusation and recommendation filed on a former day of the present term in this

court for the violation upon the part of the Louisville & Nashville Railroad Company of sections of the statutes as herein set out, and for each and every offense and for the violation of said sections in and for the particular cases as herein enumerated, as shown by exhibit hereto attached and made part hereof, marked 'C.'

The said railroad commission by virtue of the authority vested in them under the laws of this Commonwealth file this additional and amended information and recommendation to their original accusation, information, and recommendation filed in this court heretofore, and recommend and request the grand jury of the Marion circuit court that they, the grand jury, indict the said railroad company for the violation of the law as herein and heretofore set out, to the end that the Louisville & Nashville Railroad Company may be prosecuted for said violations of the sections of the Kentucky statutes hereinbefore named, and to the end that the good laws of this Commonwealth may be upheld.

RAILROAD COMMISSION OF KENTUCKY,
By C. C. McCHORD, *Chm.*,
UREY WOODSON,
CHAS. B. POYNTZ,
Railroad Commissioners."

To the reading in evidence to the jury of said report the
23 defendant, by counsel, objected. The court overruled said objection; to which the defendant, by counsel, excepted.

Counsel for the Commonwealth thereupon read in evidence to the jury from said Exhibit "C" as follows, to wit:

"October 2nd, 1894, from J. M. Shreve, one car-load of coal from Pittsburgh, Ky., to Lebanon, Ky.; rate, $1.55 per ton.

October 4th, 1894, to same party, from Altamont, Ky., to Lebanon, Ky.; rate, $1.55 per ton.

October 17th, 1894, to same party from same point to same point, same rate."

Counsel for the Commonwealth announced that he read from Exhibit C those portions referring to Oct. 2nd and to Oct. 4th only for the purpose of identifying the party, the points of shipment, and rate referred to under date of Oct. 17th, 1894.

To the reading in evidence to the jury of said extracts from Exhibit C counsel for defendant objected. The court overruled said objection; to which the defendant, by counsel, excepted.

J. M. SHREVE, called for the Commonwealth, being duly sworn, testified as follows:

Direct examination by Judge RIVES:

Q. What business are you engaged in?
A. I am engaged in the coal and implement business here.
Q. In Lebanon?
A. Yes, sir.
24 Q. How long have you been so engaged here?

A. Well, I guess, fourteen or fifteen years.

Q. Previous to that time, in what business were you engaged and where?

A. I was engaged in the coal business at Livingston, Ky.

Q. Did you, on the 17th day of October, 1894, receive a car-load of coal from Altamont, Ky., here at Lebanon?

A. Yes, sir.

Question and answer objected to as admitted and not necessary to be proven. The court overruled said objection; to which the defendant, by counsel, excepted.

Q. Now I will finish the question as I tried to put it. Did you, on the 17th day of October, 1894, receive, here at Lebanon, a car-load of coal, shipped from Altamont, Ky., over the Knoxville division of the Louisville & Nashville railroad to Lebanon, to you; and if so, what amount of coal was in the car, and what rate per ton did you pay on it as freight, and what was the aggregate amount of freight paid by you on the car?

Objected to by counsel for defendant because it is admitted by a written agreement. The court overruled said objection; to which the defendant, by counsel, excepted.

A. Well, the amount was 37,600 pounds. I paid at the rate of $1.55, amounting to $29.14.

Q. $1.55 per ton, did you mean?

A. $1.55 per ton.

Q. Did you receive the coal here at Lebanon?

A. Yes, sir.

Q. Over the Knoxville division of the Louisville & Nashville railroad?

25 A. Yes, sir.

Q. How does the line from Altamont, Ky., to Louisville, Ky., and from Altamont, Ky., to Elizabethtown, Ky., run with reference to Lebanon?

A. Well, they run through Lebanon.

Q. Do you know the distance from Altamont, Ky., to Lebanon, Ky., on that road?

A. No; I do not.

Q. About the distance?

A. Well, I suppose it is 80 miles; maybe 82 or 83 miles.

Q. Do you know the distance from Lebanon to Louisville, on the same line of road?

A. I think it is 68 miles, maybe, from here to Louisville.

Q. Is there any other line of railroad in operation from Altamont, Ky., to Lebanon, Ky., or any other line in operation from Altamont, Ky., to Louisville, Ky., or Elizabethtown, Ky., besides the Knoxville division of the Louisville & Nashville railroad?

A. Well, I don't know that there is. At Livingston there is a branch road; I don't know how it does run—where.

Q. Do you know how the coal that is shipped from Altamont to

Louisville, by way of the Louisville & Nashville railroad, comes, with reference to Lebanon?

A. Well, it comes through here, I think.

Q. Do you know how the coal that is mined and shipped from Altamont is loaded on the cars?

A. How it is loaded?

Q. Yes, sir; and by whom.

26 Objected to by counsel for defendant. Objection overruled; to which the defendant, by counsel, excepted.

A. How it is loaded on the cars? It is loaded from bank cars over the tipple—it was when I was there—into the gondolas.

Q. By whom was it loaded?

A. Well, this car of coal that you have reference to I think the Altamont Coal Co. I got this car from them at the time they were running there at Altamont. It was loaded there.

Q. In any case of coal shipped from Altamont, from any of the mines in operation there, state whether the railroad company does the loading or whether the mine operators do the loading.

Objected to by counsel for defendant. Objection overruled; to which the defendant, by counsel, excepted.

A. The operators do their loading.

Q. Who unloaded the car that you got on the 17th of October, 1894?

A. I had it unloaded.

Q. Do you know what the rule of the Louisville & Nashville Railroad Co. to the consignees of coal along its line is in regard to whether the company shall unload the coal or the consignees?

A. Well, I don't, only here at this place. We always unload the coal that we receive here.

Q. State whether or not any particular time is limited for that unloading of the coal.

27 A. Yes, sir; I believe it is 48 hours, is the limit.

Q. What kind of cars are used for the shipment of all the coal that comes through Lebanon from Altamont?

A. Well, the most of the coal is shipped in flat cars, gondolas, but I see coal passing even in box cars sometimes.

Q. Was this of yours in a gondola or box car?

A. Gondola.

Q. State whether there is any difference in those gondola cars save in the capacity or amount that may be shipped at one time on them.

A. Difference in the amount put on?

Q. Yes, sir.

A. Oh, yes; some of them will carry 30 tons. They run, I think, from about 18 to about 30 tons, the gondolas that we have on this road.

Q. Is that the only difference in the gondola cars in use on this road?

A. In size? Well, I don't know that there are any that run higher than 30 tons. There may be some even smaller than 18 tons, but I have not seen any.

Q. You have not caught the question. I admit that there is a difference in the size or capacity. My question is: Is there any other difference in the construction of the cars or kind of cars among the gondolas?

A. Well, some of them are made with a drop to unload from the bottom, but most of them you have to shovel it over.

28 Q. State whether or not there is any difference in the rate per ton on coal that you may get, whether it is shipped in a car of small capacity or one of larger capacity.

A. No; the freight per ton is the same.

Q. State whether or not the same kind of engines and crews handle the coal that stops at Lebanon and that which goes on through Lebanon from the mountains.

A. Yes, sir; they go through here. My coal usually comes on the local trains, and they unload and go on with the other freight then, beyond here.

Q. State whether or not the same number of officials and the crew of the through trains are on local trains also—that is, engineer, fireman, brakemen; and conductor.

A. Oh, yes.

Q. State whether or not the Louisville & Nashville railroad was operating this Knoxville division road as a common carrier for a number of years.

Objected to by counsel for defendant because the best evidence of that fact is the charter. The court overruled the objection, to which the defendant, by counsel, excepted.

A. Yes, sir; they have been for a number of years.

Q. State whether or not all the freight receipts and other official papers issued to shippers and consignees here by it operating this road as a common carrier have been at all times since the construction of the road and up to the present time in the name of the Louisville & Nashville Railroad Co.

29 A. Yes, sir; since I have been here.

Q. State whether or not the Louisville and Nashville Railroad Co. has its regular depot agent here at Lebanon; if so, what is his name?

A. Well, Mr. Frank Harris is agent here now at present.

Q. State whether or not he was the agent of the Louisville and Nashville Railroad Co. here at Lebanon at the time of this shipment of coal, on October 17th, 1894.

A. No, sir; I think Mr. Anthony was here at that time. That is my recollection. That was before Mr. Harris came, I think.

Cross-examination by Mr. McCHORD:

Q. Elizabethtown is not on the Knoxville branch of the Louisville & Nashville railroad, is it?

A. That is on the main stem, I think.

Q. The line of railroad from Altamont passes through Lebanon and on to Louisville; Elizabethtown is not on that line?
A. No; it is not on this line. It is on the main line.
Q. You don't pass it in going from Altamont to Louisville through Lebanon?
A. No, sir.
Q. Elizabethtown is on the main stem of the Louisville and Nashville railroad?
A. The main stem; yes, sir.
Q. The line through Lebanon and on to Altamont branches from the main stem at Lebanon Junction?
30 A. That is right.
Q. How far is it from Lebanon Junction to Elizabethtown?
A. I don't really know the distance.
Q. Give your best judgment. Fifteen or twenty miles?
A. Yes, sir; I would think it was at least twenty miles.

Redirect examination by Judge RIVES:

Q. The road from the junction down to Elizabethtown is operated by the same company that operates this part of their road from Altamont through Lebanon and on to Elizabethtown?
A. Yes, sir.
Q. To whom did you pay that $29.14 freight on that car-load of coal?
A. Well, it was to whoever was agent at the time. Very often I pay the clerks that are in there.
Q. The agent of whom?
A. Of the L. & N.
Q. Railroad Company?
A. Yes, sir.
Q. State why you paid them that amount, $29.14, at the rate of $1.55 per ton.
A. That was the amount of the charges.
Q. That was the amount demanded by them?
A. Yes, sir.
Q. You paid it here at Lebanon, I believe you said?
A. Yes, sir.

31 Counsel for the Commonwealth thereupon read in evidence to the jury a written agreement between the parties hereto. Said agreement is in words and figures as follows, to wit:

Marion Circuit Court.

COMMONWEALTH OF KENTUCKY
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Agreement as to No. 505 Only.

It is agreed for the purposes of the trial of this case only, subject to exceptions for relevancy and competency, that on the 17th day

of October, 1894, the defendant, The Louisville & Nashville Railroad Company, on the Knoxville division of the said Louisville & Nashville railroad, did transport a car-load of coal from Altamont, Ky., to Lebanon, Ky., for J. M. Shreve, and similar coal by the car-load in similar gondolas——

By Mr. McCHORD: We object to that part of the agreement with reference to the rate of transportation from Altamont to Elizabethtown as incompetent.

The court overruled said objection; to which the defendant, by counsel, excepted.

By Mr. McCHORD: Now, your honor, we object to that part of it with reference to transportation to Louisville as incompetent.

The court overruled said objection; to which the defendant, by counsel, excepted.

—did transport a car-load of coal from Altamont, Ky., to Lebanon, Ky., for J. M. Shreve, and similar coal by the car-load, in similar gondolas or coal cars, similarly loaded from Altamont,
32 Ky., to Louisville, Ky., and to Elizabethtown, Ky., over the same line of road, and a longer distance and in the same direction, the distance from Altamont to Lebanon being shorter and included in the longer distance from Altamont to Louisville and to Elizabethtown, Ky., and did for said transportation services charge and receive the following rates, to wit: From Altamont, Ky., to Louisville, Ky., $1.00 per ton, and to Elizabethtown, Ky., $1.30 per ton, and from J. M. Shreve, at Lebanon, Ky., $1.55 per ton on said date.

(Signed) W. H. SWEENY,
Attorney for the Commonwealth.
THE LOUISVILLE & NASHVILLE RAILROAD CO.,
By W. C. McCHORD, *Att'y.*

By the COURT: It would be proper for the court to instruct the jury that this is an agreed statement of facts on the part of the parties.

C. C. McCHORD, called for the Commonwealth, being duly sworn, testified as follows:

Direct examination by Judge RIVES:

Q. I believe you were chairman of the railroad commission of Kentucky in the year 1894 and at the time this report was made to the Marion circuit court?

A. Yes, sir; I was chairman of the commission and member of the commission from 1891 up to December, 1895, or probably November, 1895. I resigned as commissioner in November, 1895.

Q. State whether or not all of the incorporated railroad companies of the State were required to report to the railroad commission, and whether or not the Louisville & Nashville Railroad Co. did,
33 in accordance with that requirement, make reports to the railroad commission.

Objected to by counsel for defendant.

By the COURT: I don't know about the competency of that. That is trying to prove what the law is.

By Mr. SWEENY: The object of the question is to prove that they were operating the road at this time as the Louisville & Nashville Railroad Co., and operating it as common carriers.

The court thereupon overruled the objection; to which the defendant, by counsel, excepted.

A. The Louisville and Nashville Railroad Co., like all the balance of the railroads in the State, made annual reports to the railroad commission during the time I was a member of the commission as to their earnings; they also made reports as to their property to the auditor of this State, and the auditor would turn those reports over to the railroad commission, and that shows its property for taxation. They also made any other reports that the railroad commission asked of them.

Q. State what company was in 1894 operating the line of road from Altamont, Ky., through Lebanon, Ky., to Louisville, Ky., and to Elizabethtown, Ky.

A. The Louisville & Nashville Railroad Company.

Q. State whether or not they were operating that as a common carrier.

A. They were.

34 Q. State whether or not you know what the universal custom or rule was as to the loading and unloading of coal, where it was shipped by the car-load over the Knoxville division of the Louisville & Nashville Railroad Co. Whether it was loaded or unloaded by the railroad company or loaded by the mine operators and unloaded by the consignees.

Objected to by counsel for defendant. Objection overruled; to which the defendant, by counsel, excepted.

A. I have no personal knowledge on that, only information obtained as railroad commissioner from the parties on this investigation. I never saw them, that I recollect, either unloading or loading a car-load of coal on the Knoxville branch. I can only state from the information I gathered as an official.

By the COURT: I don't think that would be proper.

Q. Have you got it from officers of the Louisville & Nashville Railroad Co.?

Objected to by counsel for the defendant.

By the COURT: I don't think that would be competent. I will sustain the objection to his making that further statement. He can state that he did not have any personal information, only information received through certain sources. For him to go on and state what that information was, I think would be incompetent. I will sustain the objection.

To the ruling of the court the Commonwealth, by counsel, excepted.

Counsel for defendant declined to cross-examine.

35 Counsel for the Commonwealth thereupon offered in evidence a part of the commissioners' report not heretofore offered.

Counsel for defendant objected to the introduction in evidence of said report. The court overruled said objection; to which the defendant, by counsel, excepted.

Said report is in words and figures, to wit, as it was thereupon read to the jury in evidence:

"To the Marion circuit court:

The railroad commission of the State of Kentucky, under and by virtue and by direction of the statutes made in such cases provided, hereby files information against the Louisville & Nashville Railroad Company, and charges said Louisville and Nashville Railroad Company with charging, collecting, and receiving a greater compensation in the aggregate for the transportation of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction, the shorter being included in the longer distance; that for more than twelve months last past the said Louisville & Nashville Railroad Company, upon all shipments of coal from Altamont, Ky., to Lebanon, Kentucky, charged a greater compensation in the aggregate than said company charged, collected, and received for the shipment of a like commodity from said points to Louisville, Kentucky. The rates so charged, collected, and received to Lebanon, Kentucky, from said points, per ton, were as follows: from

36 Altamont, $1.55, while upon similar shipments from said points to Louisville, Kentucky, a greater distance over the same line in the same direction, the rate charged, collected, and received by said company during the whole of said time did not at any time exceed $1.10 per ton from any of said stations.

Said commission further states that heretofore, to wit, on the — day of ——, 1894, the Commercial Club of Lebanon, Kentucky, filed written complaint with this board, charging said railroad company with the offense as hereinbefore stated; that pursuant to its duty this commission did investigate said charges and found them to be true; that before said investigation was made said Louisville and Nashville Railroad Company was duly notified, and a meeting was held at Lebanon, Kentucky, and also at Louisville, Kentucky, at which testimony offered by said complainant and by said railroad company of witnesses was reduced to writing, and after a full investigation of said charges and consideration of all the evidence offered said commission, on the — day of ——, 1894, made and entered the order, a copy of which is hereto attached, marked 'A.'

A list of the names of the shippers and witnesses to said acts and charged upon the part of said Louisville and Nashville Railroad Company is hereto attached, marked 'B.'

Said commission further states that the distance from Lebanon to Louisville, Kentucky, is 67 miles greater than from Lebanon,

Kentucky, to any of the aforesaid points; that said illegal
37 acts on the part of said Louisville and Nashville Railroad Company are continuing, and said company at this time charges, collects, and receives the rates aforesaid upon all shipments of coal to said points.

In obedience to the requirements of the law, this information is filed with the Marion circuit court for such action as may be required by the statutes of the State, and this commission respectfully recommends that said Louisville and Nashville Railroad Company be prosecuted by an indictment or by action in the name of the Commonwealth for the recovery of the penalties imposed by the Kentucky statutes for violation of its provision as hereinbefore stated.

January 26, 1895.

RAILROAD COMMISSION OF KY.,
By C. C. McCHORD, *Chairman*,
UREY WOODSON, *Commissioners*."

The Commonwealth thereupon rested.

The defendant thereupon moved the court to peremptorily instruct the jury to find a verdict of not guilty; to which motion the Commonwealth, by counsel, objected. The court sustained said objection and overruled said motion; to which action of the court the defendant, by counsel, excepted.

38 The defendants then offered in evidence to the jury the following acts of the General Assembly of the Commonwealth of Kentucky, to wit:

An act to charter the Louisville and Nashville Railroad Company, approved March 5th, 1850, found in the Acts of 1849, 1850, pages 427 to 437, inclusive.

An act to charter the Lexington & Frankfort Railroad Company, approved February 28th, 1848, found in the Laws of Kentucky for 1847–'8, pages 34 to 47, inclusive.

An act to amend the charter of the Lexington & Frankfort Railroad Company, approved February 26th, 1849, found in the Acts of 1848–'9, page 23.

An act entitled An act to amend an act entitled An act to charter the Louisville and Nashville Railroad Company, approved March 20th, 1851, found in volume 2, Acts of 1850–'1, pages 442 to 445, inclusive.

Counsel for the Commonwealth objected to the introduction of the above acts because they are not all of the amendments to the charter of the Louisville & Nashville Railroad Company, and the court thereupon ruled that all the amendatory acts were admissible in evidence.

All of said acts are here referred to as a part of this record.

It is further agreed between counsel for the parties that the defendant accepted said charter of March, 1850, and organized under the same; and it is further agreed that the action, if any, of
39 said defendant with reference to each amendment to said charter thereafter passed is as follows:

Amendment 1. An act to amend an act entitled An act to charter the Louisville & Nashville Railroad Company, approved March 5th, 1850. Approved March 20, 1851.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 2. An act to amend an act to charter the Louisville & Nashville Railroad Company, approved March 5th, 1850. Approved December 15, 1851.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 3. An act to amend an act entitled An act to charter the Louisville and Nashville Railroad Company, approved March 5, 1850, and the act amending same, approved March 20, 1851. Approved January 9, 1852.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 4. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved February 24, 1854.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

40 Amendment 5. An act for the benefit of the Louisville & Nashville Railroad Company. Approved March 7th, 1854.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 6. An act to amend the charter of the Louisville & Nashville Railroad Company. Approved January 17th, 1856.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 7. An act to amend the charter of the Louisville & Nashville Railroad Company. Approved February 6th, 1858.

Accepted by the company March 26th, 1858.

Amendment 8. An act to amend the charter of the Louisville & Nashville Railroad Company. Approved February 28th, 1860.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

41 Amendment 9. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved May 16th, 1861.

Accepted, as required by section 2 of the act, by the stockholders of the company on October 7th, 1861.

Amendment 10. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved February 26th, 1863.

This amendment was applied for by the company, has been acted

on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 11. An act to amend the charter of the Louisville & Nashville Railroad Company. Approved January 8th, 1864.

Accepted, as required by section 1 of the act, by the stockholders of the company at the annual meeting held on October 3rd, 1864.

Amendment 12. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved February 10th, 1864.

Accepted by the stockholders of the company at the annual meeting held on October 3rd, 1864.

42 Amendment 13. An act for the benefit of the Louisville and Nashville Railroad Company. Approved March 2nd, 1865.

This amendment was applied for by the company, was acted upon, and the company did not consider a formal acceptance necessary.

Amendment 14. An act to amend the charter of the Louisville and Nashville Railroad Company, approved March 5th, 1850. Approved February 21st, 1868.

Accepted, as required by sec. 1 of the act, by the stockholders of the company at a meeting held on March 31st, 1868.

Amendment 15. An act to authorize the Louisville & Nashville Railroad Company to extend its Bardstown branch. Approved March 10, 1869.

Can find no record of its acceptance.

Amendment 16. An act to amend the charter of the Louisville and Nashville railroad. Approved March 21st, 1870.

Can find no record of its acceptance.

Amendment 17. An act to amend the charter of the Louisville & Nashville railroad. Approved March 15th, 1871.

This amendment was accepted October 4, 1871, and May 15, 1872; was repealed by act approved February 9th, 1876, at the instance of the company.

43 Amendment 18. An act to authorize the counties of Madison, Estill, Lee, Owsley, the city of Louisville, and any other cities, counties, or towns in this State, corporations, or individuals to subscribe for stock in a branch of the Louisville & Nashville railroad from Richmond to Irvine and Scotts Landing or Beattyville, in Kentucky. Approved March 16th, 1871.

Can find no record of its acceptance.

Amendment 19. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved February 1st, 1872.

Applied for without authority from the company and rejected by the stockholders May 15th, 1872.

Amendment 20. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved March 19th, 1872.

Accepted by the stockholders of the company October 1st, 1873.

Amendment 21. An act to amend the charter of the Louis-

ville and Nashville Railroad Company and to increase the directors thereof to eleven. Approved February 9th, 1876.

Accepted by the stockholders of the company October 4th, 1876.

44 Amendment 22. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved March 9th, 1876.

Accepted by the stockholders of the company October 4th, 1876.

Amendment 23. An act to amend the charter of the Louisville and Nashville railroad. Approved March 18th, 1876.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 24. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved March 6th, 1878.

Accepted by the stockholders of the company October 2nd, 1878.

Amendment 25. An act amending the charter of the Louisville and Nashville Railroad Company. Approved January 27th, 1880.

Accepted by the stockholders of the company March 26th, 1880.

Amendment 26. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved February 27th, 1880.

Accepted by the stockholders of the company March 26,
45 1880.

Amendment 27. An act to authorize the Louisville chancery court to appoint the Louisville & Nashville Railroad Company receiver of a certain trust fund. Approved January 28th, 1882.

Applied for and acted upon by the company.

Amendment 28. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved April 7th, 1882.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 29. An act to amend the charter of the Louisville & Nashville Railroad Company, approved March 5th, 1850. Approved April 29, 1890.

Accepted by the stockholders of the company July 6th, 1891.

46 S. R. KNOTT, called for the defendant, being duly sworn, testified as follows:

Direct examination by Mr. HINES:

1 Q. State your residence and occupation.

A. I reside at Louisville, Kentucky; am vice-president of the Louisville & Nashville Railroad Co.

2 Q. State the duties of that position, and the extent of your experience and familiarity with railroad rates and rate-making on the Louisville & Nashville railroad and other railroads.

A. Among the duties connected with that position is the supervision of the freight and passenger business of the company. I have been connected with railroads for more than twenty years. During the last fifteen or sixteen years I have been more or less di-

rectly connected with the making of rates on freight carried by the Louisville & Nashville railroad. During that time I have been in the general freight office as clerk, chief clerk to the traffic manager, assistant to the president, traffic manager of the company. For the past ten years or more I have been closely and directly, almost exclusively, connected with the supervision of the rates charged for the transportation of freight and passengers over the Louisville and Nashville Railroad lines.

3 Q. State the relative positions of Altamont, Lebanon, Louisville, and Elizabethtown with reference to the line of the Louisville and Nashville railroad.

47 A. Altamont is a coal-shipping station on what is known as the Knoxville division of the Louisville and Nashville railroad. This division diverges from the main stem of the Louisville and Nashville railroad at Lebanon Junction, Kentucky, at a point about 30 miles south of Louisville, and runs southeastwardly through Lebanon, Altamont, Pittsburg, &c., to the Kentucky and Tennessee State line at Jellico. Lebanon is 67 miles southeast from Louisville. Altamont is 84 miles beyond Lebanon, and 151 miles from Louisville. Elizabethtown, Kentucky, is a point on the main stem of the Louisville & Nashville railroad, 12 miles south of Lebanon Junction and 42 miles south of Louisville. It is a junction point between the Illinois Central railroad and the Louisville & Nashville railroad.

4 Q. State fully the circumstances and conditions other than those, if any, relating to cost of service, under which coal was, in October, 1894, and is now, transported from Altamont to Lebanon and Louisville respectively. State the effects in 1894 and now of the transportation of coal at less rates from said point to Louisville than from said point to Lebanon upon all persons and places interested, and especially whether any community, person, or interest then was or could have been or now is or can be injured thereby, and state what would have been the effect then and would be the effect now if the railroad company had been then and were now re-

48 quired to charge no more on coal to Lebanon than it charges to Louisville.

Objected to by counsel for the Commonwealth.

Counsel for defendant resisted said objection and claimed that the question was proper, and that the facts which would be disclosed by the answer thereto would be relevant and competent under a proper construction of section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes.

Counsel for defendant further stated that the defendant claimed, under section 1 of article 14 of the amendments to the Constitution of the United States, prohibiting any State to deprive any person of property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, the right under the circumstances which would be disclosed by said answer to transport coal from Altamont and other coal-shipping points to Lebanon at the rate of $1.55 per ton, or other just and proper rate,

and at the same time to transport coal from Altamont and other coal-shipping points to Louisville at a less rate.

That section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes, if so constructed as to prevent said practice under the circumstances which would be disclosed in the answer to said question, would have the effect, arbitrarily and without any justification or excuse, of compelling the defendant to give up such transportation of coal to Louisville and the revenue accruing to it therefrom, or of requiring the defendant, arbitrarily and without any justification or excuse, to reduce ma-
49 terially its rates on coal from Altamont and other coal-shipping points to Lebanon and other intermediate points without any inquiry, judicial or otherwise, to ascertain whether said last-named rates were unjust or unreasonable, and when in fact reasonable, and that therefore said constitutional and statutory provisions of the State of Kentucky so construed are unconstitutional and void because in conflict with the aforesaid provisions of the Constitution of the United States.

The defendant, by counsel, further contended that by reason of the contract existing between it and the Commonwealth of Kentucky, resulting from the acceptance by it of the charter granted to it by the Commonwealth of Kentucky, it had the right to engage in the transportation of traffic and to receive revenue therefor, of which right the Commonwealth of Kentucky could not deprive it; that if the character of traffic to be accepted by it or the rates to be accepted for such traffic could be subject to regulation at all by said Commonwealth of Kentucky it could only be a just and reasonable regulation, having for its objects the promotion of the public welfare, and that any arbitrary regulation, either requiring the defendant without any justification or excuse to give up entirely the transportation of coal from Altamont and other coal-shipping points to Louisville or of requiring it, arbitrarily and without justification or excuse, to reduce materially its rates on coal from Altamont and other coal-shipping points to Lebanon and other intermediate points with-
50 out any inquiry, judicial or otherwise, as to whether said last-named rates are unjust or unreasonable, and when in fact they are reasonable, would be an impairment of the obligation of said contract, contrary to subsection 1 of section 10 of article 1 of the Constitution of the United States, prohibiting any State to pass any law impairing the obligation of contracts; and counsel for the defendant stated that the defendant relied upon the right and immunity guaranteed to it by said subsection 1 of section 10 of article 1 of the Constitution of the United States, and that the facts which would be disclosed by the answer to said question would show that section 218 of the constitution of Kentucky and section 820 of the Kentucky statutes, if construed so as to exclude from consideration the facts which would be disclosed by said answer, would impair the obligation of said charter contract as above stated.

The court, however, decided each and all of said contentions

against the defendant, and sustained the objection of the plaintiff to the question, and refused to allow said question to be answered; to which decision and ruling of the court and to each and every part thereof the defendant, by counsel, at the time excepted and still excepts.

And thereupon counsel for defendant avowed that the witness if allowed to answer said question would answer truly as follows:

That coal was in 1894 and is now transported from Alta-
51 mont and a similar coal-shipping stations, such as Pittsburg, Ky., Grays, Ky., &c., to Lebanon, Ky., to be used there for steam and domestic purposes, at rates related to the rates charged for the transportation of coal from the same points of shipment for the same purposes to other points in Kentucky similarly situated. These rates I believe to be fair and reasonable. They have been in effect for a number of years, and have admitted and do admit of the use of both steam and domestic coal coming from those points and delivered at Lebanon at prices which are not excessive, and which prices have, from time to time, been lowered since the mines were first opened in the Altamont and Jellico district. They are made with relation to the other rates of freight carried on the Knoxville branch to Lebanon and other points similarly located. They are made having in view the competition of coal with other fuel, such as wood, which is available at Lebanon for both domestic and steam purposes.

The rates to Lebanon are also effected by the competition of coal coming from Louisville, which is a large and important distributing market for coal brought there by water or rail, and which coal of high quality can be shipped from Louisville to Lebanon, and so in fact was shipped until by the opening of the mines in Altamont and Pittsburg district it was found that coal of good quality and at the rates charged from Altamont or Pittsburg to Lebanon could be delivered at Lebanon at lower prices than coal shipped
52 from Louisville to Lebanon. Lebanon is not situated on a navigable stream, and before the extension of the Knoxville division into the coal-fields in the vicinity of Altamont and Pittsburg it depended for such coal as it used upon coal brought into Louisville from mines in Pennsylvania and West Virginia, by barges down the Ohio river, at an extremely low cost of transportation and sold in Louisville at prices relatively low, and shipped from that point to Lebanon. Of necessity, therefore, the consumers of coal at Lebanon were then paying more for coal than the consumers at Louisville by at least the rates on coal from Louisville to Lebanon. When the Knoxville division was completed beyond Lebanon to the coal-fields, then Lebanon had an additional source of supply, being enabled to obtain coal from mines in that field as they were opened, and they paid for the transportation of same to Lebanon the rates then fixed by the Louisville & Nashville road, which were in the beginning higher than the rates charged in 1894 or than the rates which are now charged.

Coal from these mines on the Knoxville division, if brought into Louisville, has to be sold there for prices obtainable in competition

with coal reaching Louisville by rail or water transportation from other points.

The controlling condition fixing the price that the Kentucky coal miners can secure for coal in Louisville is the price of coal mined in Pennsylvania or West Virginia and brought to Louisville down the Ohio river.

For quite a number of years after the Knoxville division
53 was extended into the southeastern Kentucky coal-fields Louisville continued to get practically all of its coal from Pennsylvania and West Virginia, via the Ohio river, at very much lower prices than Lebanon had to pay, because Louisville enjoyed the advantage of being upon a waterway affording the cheapest known means of transportation.

As the development of the coal-mining industry along the Knoxville division continued, it was found that in producing coal for the interior towns, such as Lebanon, certain grades of coal were produced which could not be readily placed or disposed of in such local markets, the demand in those markets not being sufficiently steady or sufficient in amount to consume the regular output of the mines. The result of this was that the mines were hampered and restricted in their operations and the cost of the production of the coal for sale at the local markets, such as Lebanon, was increased over what it would otherwise have been.

Finding these conditions to exist, the Louisville & Nashville Company arranged to transport coal from those mines to Louisville at rates which would enable this coal to be sold in Louisville in competition with coal reaching Louisville by river. The railroad company found it was able to transport this coal at a low rate, because whatever traf-ic was thus secured was new or additional traf-ic, imposing little additional expense upon the company, and the revenue thus derived, although at a small rate per ton, exceeding the additional expense immediately connected with its handling,
54 provided a part of the income necessary for the continued operation of the road, which would otherwise have had to be provided by the local traf-ic, such as the transportation of coal from Altamont or Pittsburg to Lebanon.

It was under these circumstances and in pursuance of this arrangement that the rate on coal from the above-named points to Louisville in 1894 was then less and is now less than the rate on coal from the same points to Lebanon.

The effect of this arrangement during the year 1894 and before and afterwards was highly beneficial to all persons connected with the mines, either directly in the way of miners or mine operators or indirectly in the way of producers of the supplies consumed by those connected with the mines. It gave the mines a market where they could place their surplus output instead of letting it go to waste, or instead of shutting down the mines until the local market could consume that surplus output.

The mine operators did not receive for the coal so placed on the Louisville market as high price per ton as they received from the consumers at Lebanon and other local points, but since the business

was new or additional business to them, which did not proportionately or materially increase the expenses of the mines, and frequently did not increase those expenses at all. the surplus coal could be and was sold on the Louisville market for a very low price.

This was indirectly highly advantageous to the mine operators and everybody else connected in any way with the mines
55 or interested in their prosperity, giving the miners much steadier employment, while materially reducing the cost per ton of mining the coal.

By reason of this reduction in the price per ton of mining coal a very marked reduction resulted in the price of coal to consumers at Lebanon and other local points.

While prior to this arrangement those consumers paid in the beginning two dollars per ton for lump coal at the mines, they were able in 1894 to get the same coal at a dollar per ton, which reduction was largely, if not wholly, due to the fact that the miners could place their surplus output on the Louisville market.

The effect upon Lebanon and other local points, therefore, was decidedly beneficial. The Louisville & Nashville Railroad Company was benefitted because it obtained with but very little additional expense an additional traf-ic, paying, it is true, only a small revenue per ton, but a revenue believed to be in excess of the extra cost of handling it, and thereby enabling the company to get a fuller use out of its railroad and equipment than it would otherwise have been able to do. This was done without any increase in rates at Lebanon or other intermediate point. but, on the contrary, because of the income from this new source the railroad was and is enabled to carry coal and other freights to Lebanon and other points at lower rates than it could otherwise charge.

As to Louisville. so far as this arrangement had any effect at all, it was beneficial in giving the consumers the choice of varie-
56 ties of coal which they had not theretofore enjoyed, and possibly at times standing in the way of temporary combinations of dealers in river coals to increase the price of coal to Louisville consumers. Generally speaking, Louisville got its coal at the same price for which it obtained it before, for no attempt was made by the Kentucky coal operators to cut under the usual prices made by the handlers of Pennsylvania and West Virginia coal.

No community, person, or interest was or could have been injured by this arrangement. The consumers of coal, neither at Lebanon nor at any other local point, were in any degree prejudiced by the arrangement, because thereby Louisville consumers did not get any advantage over them which they did not enjoy independently of the arrangement and which they had not enjoyed long prior to the arrangement. The price of transportation of coal to Lebanon was not increased at all by reason of the lower rate to Louisville. Lebanon still got the same rate as or a lower rate than it would have gotten, and it was at no greater disadvantage with respect to Louisville than it was before the arrangement was made. Indeed, by

virtue of the arrangement, it got, in the reduced price of coal per ton at the mines and the lowered rate, a substantial benefit.

If the railroad company had been required to charge no more on coal from Pittsburg, Grays, and Altamont to Lebanon and other local points than it charged on coal from the same points of
57 shipment to Louisville, it would have been compelled to do one of two things: First, to give up the coal traffic from those points of shipment to Louisville in which it had in the past participated and from which it had derived a revenue, as I have already explained, without in any wise injuring any of the intermediate points or any other community or person, or, second, it would have been required to reduce all of its rates on coal from those points of shipment to all intermediate points to the low rate from those points of shipment to Louisville, notwithstanding the fact that those intermediate rates are only just and reasonable rates for the transportation service performed. Such reduction would thus have been ordered without any investigation or inquiry, judicial or otherwise, to establish their unreasonableness or injustice. Either of the courses mentioned would have entailed serious loss upon the Louisville & Nashville Railroad Co. If forced to choose between them the company doubtless would have given up the coal business to Louisville with the revenue derived from that business, and to stand the loss thereby inflicted, rather than to stand the losses resulting from so material a reduction of all its intermediate rates. No person or community could have been benefited by any such result.

On the contrary, the mines and all those dependent upon the mines would have been undoubtedly injured, and the mines would have been relegated to the discouraging conditions prevailing prior to the adoption of the arrangement whereby southeastern Ken-
58 tucky coal could be placed in the Louisville market, and Lebanon and other intermediate points would also have been injured not only by the decrease in the demand at the mines for flour and other supplies furnished by them, but directly by an increased price which would no doubt have been placed upon the coal consumed by them.

In brief, the transportation of coal from the points above named to Louisville throughout 1894 was absolutely controlled by the competition on the Louisville market with the coal from Pennsylvania and West Virginia, brought to Louisville by river, and the mine operators had to reduce the price of their coal and the railroad company had to reduce the rate for its transportation very materially in order to get Kentucky coal into the Louisville market. The transportation to Lebanon was not controlled or affected by any such competition. The fact that the railroad company joined with the mine operators in recognizing and meeting the condition at Louisville was in no sense an injury to Lebanon. It neither gave to Louisville an advantage over Lebanon which it did not otherwise possess, nor did it increase the rate of transportation to Lebanon, but, on the contrary, it was decidedly beneficial to all interests affected by it; and if the arrangement had not been made, the result would

have been simply to cause a withdrawal from participation by the Kentucky coal-operators in the Louisville market and from sharing by the railroad company in the transportation of coal to that market without in any way benefitting Lebanon, but with strong
59 probabilities of injuring it in various ways, including an increased price of coal.

All the above facts were true not only in 1894, but have been true ever since and are true now.

And thereupon counsel for defendant, for the same reasons urged by him in resisting the objection to the question, and still claiming under and relying on said subsection 1 of section 10 of article 1 of the Constitution of the United States, and on said section 1 of the fourteenth amendment thereto, for the reasons stated in resisting the objection to the question, moved the court to permit the witness to answer the question accordingly, but the court still decided each and all of said contentions against the defendant, and refused to permit the witness to answer the question; to which ruling of the court and to each and every part thereof the defendant at the time excepted and still excepts.

5 Q. State generally the effects upon all persons and places involved of railroad companies making low rates to and from places at which controlling and unavoidable competition prevails without making correspondingly low rates at intermediate non-competitive points; are any of said communities, places, or interests prejudiced thereby; what would be the effect of requiring railroad companies to charge no more for the transportation of property of like kind for shorter than for longer distance in the same direction and including the shorter distance, in all instances except where the
60 actual cost of transportation, estimated with reference to necessary outlays and expenditures in carrying passengers and loading, moving, and unloading freight trains, is greater for the shorter than for the longer distance, and in addition state these various effects with reference to railroads in Kentucky, and particularly to the Louisville and Nashville railroad in Kentucky.

Objected to by counsel for the Commonwealth.

Counsel for defendant resisted said objection, and claimed that the question was proper, and that the facts which would be disclosed by the answer thereto would be relevant and competent under a proper construction of section 218 of the constitution of Kentucky and section 820, Kentucky Statutes.

Counsel for defendant further stated that the defendant claimed, under section 1 of article 14 of the amendments to the Constitution of the United States, prohibiting any State to deprive any person of property without due process of law or to deny to any person within its jurisdiction the equal protection of the laws, the right, under the circumstances which would be disclosed by said answer, to transport tra-fic at low rates to or from places at which controlling and unavoidable competition might prevail and might necessitate such rates without making rates as low to intermediate non-competitive

points, even though the actual cost of transportation, estimated with reference to necessary outlays and expenditures in carrying
61 passengers and loading, moving, and unloading freight trains, could not be shown to be greater for the shorter than for the longer distance; that section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes, if so construed as to prevent said practice under such circumstances would have the effect, arbitrarily and without any justification or excuse, of compelling the defendant to give up its competitive tra-fic and the revenue arising therefrom or of requiring the defendant, arbitrarily and without any justification or excuse, to reduce materially its rates on non-competitive tra-fic without any inquiry, judicial or otherwise, to ascertain whether such last-named rates were unjust or unreasonable, and that therefore said constitutional and statutory provisions of the State of Kentucky so construed are unconstitutional and void because thereby in conflict with the aforesaid provisions of the Constitution of the United States.

The defendant, by counsel, further contended that by reason of the contract existing between it and the Commonwealth of Kentucky, resulting from the acceptance by it of the charter granted to it by the Commonwealth of Kentucky, it had the right to engage in the transportation of traffic and to receive revenue therefor, of which right the Commonwealth of Kentucky could not deprive it; that if the character of traffic to be accepted by it or the rates to be accepted for such traffic could be subject to regulation at all by said Commonwealth of Kentucky, it could only be a just and
62 reasonable regulation, having for its object the promotion of the public welfare, and that any arbitrary regulation, either requiring the defendant, without any justification or excuse, to give up entirely said competitive traffic and the revenue arising therefrom or of requiring it, arbitrarily and without justification or excuse, to reduce materially its rates on said non-competitive traffic without inquiry, judicial or otherwise, as to whether said last-named rates are unjust or unreasonable, would be an impairment of the obligation of said contract, contrary to subsection 1 of section 10 of article 1 of the Constitution of the United States, prohibiting any State to pass any law impairing the obligation of contracts.

And counsel for the defendant stated that the defendant relied upon the right and immunity guaranteed to it by said subsection 1 of section 10 of article 1 of the Constitution of the United States, and that the facts which would be disclosed by the answer to said question would show that section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes, if construed so as to exclude from consideration the facts which would be disclosed by said answer, would impair the obligation of said charter contract, as above stated.

The court, however, decided each and all of said contentions against the defendant and sustained the objection of the plaintiff to the question and refused to allow said question to be answered; to which decision and ruling of the court and to every part thereof the defendant, by counsel, at the time excepted and still excepts.

And thereupon counsel for the defendant avowed that the witness, if allowed to answer said question, would answer truly as follows:

63 Primarily or as an original question, the Louisville & Nashville railroad does not, nor so far as my experience goes does any other railroad company, make a lower charge for the service to the longer-distance point than for carrying the same kinds of traffic to the intermediate or shorter distance point. This lower charge for the longer haul is only made where the circumstances and conditions under which the service to such longer-distance point is performed are substantially dissimilar from the circumstances and conditions under which the transportation service is performed to the intermediate-distance point.

When a locality is situated, for example, upon a navigable river, and by reason of that situation enjoys lower freight rates than other localities not so situated, a railroad company reaching there, in order to share in the traffic to and from that point influenced by the competition mentioned, must reduce its rates to approximate those already enjoyed by such locality. If the railroad company does not do so it cannot share in that traffic. As a rule, the railroad company can afford to and does meet this competition. It has to maintain its road and equipment and meet its just and lawful obligations in the shape of interest on bonds, taxes, etc., and the handling of this additional competitive traffic does not increase the gross expenses of the road proportionately with the increase in gross receipts. On the contrary, there is only a slight increase in expense incurred as related to the total expense necessary to be met, so

64 that a comparatively small revenue per ton for the competitive traffic makes such traffic profitable in the sense that the railroad company is better off to share in the traffic at that rate than not to share in it at all, and since that rate is absolutely fixed by controlling and unavoidable competition, it must meet that rate or not share in the traffic. If a similar adjustment of rates were applied to all the railroad company's traffic the result would be to deprive it of a source of revenue to which it is justly entitled under rates reasonably adjusted with which to pay the great bulk of the expenses of maintaining and operating a railroad.

With this explanation, the question may be readily answered, making the low rate to and from the point enjoying such controlling and unavoidable competition, without charging higher rates for shorter intermediate distances to or from non-competitive points, does not in anywise injure the non-competitive points. It does not place them at a disadvantage with respect to the competitive point. It simply recognizes the advantages of the competitive point, which would exist just the same, whether the railroad company recognized them or not.

Its effect upon the competitive point is calculated to be salutary, in that it affords a choice of routes which would not otherwise be enjoyed. Its effect upon the railroad company is to give it an additional traffic and an additional revenue, though a comparatively small revenue per ton.

Neither the competitive point nor the non-competitive point nor

any person or interest at either is in any degree prejudiced
65 by such an arrangement.

It is to the interest of the railroad company that the business at its local non-competitive points should be increased, and good judgment requires the railroads to foster and promote the business at such points, so far as it can be properly done.

In some sections of the country, where the railroads run through a territory already thickly settled, producing traf-ic important in amount, and in many cases handling a class of business that is competitive either in its production or distribution with business at other points, as, for instance, points on a navigable stream, lake, or ocean, the railroads can and do, with a view of promoting their local traf-ic, recognize such competitive conditions. They, in effect, say, "We do not wish to and could not if we would withdraw from the long-distance competitive point the advantages and facilities enjoyed by it, but, under the circumstances, will adjust our rates to the intermediate points with relation to those conditions."

Where, however, a railroad runs through a sparsely settled country, which country is furnished by the building and operation of such railroad with facilities of transportation not previously enjoyed, and with rates of freight very much lower than could in any other wise be secured, and upon the returns from which local traf-ic tributary to the line it is compelled to depend for the necessary revenue to operate and maintain its property, it does not and should not, under those conditions, reduce its rates on all traf-ic to
66 and from intermediate points to as low a figure as is charged the long-distance point under different conditions. It secures a revenue from its long-distance competitive business supplementary to its local revenue, and uses same as a benefit to the local communities along its line, in furnishing them improved and cheaper transportation than otherwise it would be able to offer.

If railroad companies were required to charge no more for the transportation of like kinds of freight for the shorter distance than for the longer distance, except where the actual cost of transportation (estimated, if such estimate were possible, with reference to the actual loading, moving, and unloading of the property) were greater for the shorter than for the longer distance, the result would be that only in the rarest instances, if at all, could the railroad company charge less for the longer than for the shorter distance. The cost of transportation of any particular commodity between two points is not susceptible of ascertainment, and only in very rare instances would such a state of facts exist as to make it possible to show with reasonable certainty the actual cost of transportation, loading, moving, and unloading of freight for a given longer distance to be less than the actual cost of loading, moving, and unloading such freight for the shorter distance, and even in such rare instances it would be utterly impossible to arrive at the amount of difference between the two costs.

I am aware of several instances where attempts have been
67 made to show that by reason of the greater amount of business on the long haul and the ability to handle it in large

quantities, the cost of its transportation was cheaper than the cost of the transportation for a short haul. In every such case with which I have been acquainted, it has been utterly impossible to state with any degree of precision the actual cost with respect to the transportation of a particular commodity, and the testimony has therefore been inconclusive and unavailing.

Reference to the cost "in the loading, moving, and unloading freight trains" in connection with rates on specific commodities or articles offered for transportation is misleading and improper. As I have said, efforts have been made to ascertain if possible whether or not there was a lower cost of expense in loading, moving, and unloading freight trains over the longer distance to competitive points, involving large traffic than on the same kinds of freight over shorter distances to points with a smaller traffic. Even these differences could not be ascertained with accuracy; but no effort has been made nor could be made to show the cost of handling one article out of the many thousand kinds of articles transported. This would have to be done in the event the rates on each kind of freight were to be adjusted with relation to the cost of handling.

Even where the entire business is involved at one point as compared with the entire business involved at another and shorter distance point, if it could be shown or assumed with reasonable fairness that the cost of handling was less to the longer-distance
68 point, such a difference is not used by the railroad managers as calling for or justifying a lower rate for the longer haul; for where the circumstances and conditions which effect rates are not dissimilar the railroads, properly and in the avoidance of unfair discrimination, continue to increase their rates as the haul increases, or as the actual service performed increases.

While an assumption or mere approximation may be made of the cost, so termed, of handling through freight trains as compared with local freight trains, not even such assumption or approximation has been made with regard to the cost of moving each particular ton of freight or each barrel or package of freight in such trains.

This so-called cost of handling or cost of loading, moving, and unloading freight trains, even if it were possible of ascertainment, would of necessity be variable, and would change from day to day, both to the local point and to the terminal point. Therefore, if it were used as a factor controlling the rates, it would require an adjustment of rates impossible to adapt to the business, as it might offer, and, moreover, in violation of the law, which does not permit of rates to be changed from day to day, or from point to point, without previous notice, and it would result in unjust discrimination as between shippers, or as between localities, or as between similar kinds of traffic.

If railroad agents in fixing their rates are limited in the
69 making of the lower rate to the longer-distance point to the cases where it can be demonstrated that the longer haul costs less than the shorter haul, it would be impossible to adjust rates to the shorter-distance point in any case higher than the longer-

distance point, and at the same time comply with the requirements of the law as to publishing rates and filing same in advance of the transportation, because the final cost, even assuming the impossible, namely, the ascertainment of such cost, cannot be ascertained or approximated before the service is performed, and therefore the rates could not be made subject to that restriction nor in accordance with that rule, and at the same time applied in accordance with the requirements of the law to the traffic actually moved. The result would be finally to require the railroads to haul all their business upon the basis of the low competitive rates or surrender the competitive traffic carried at such rates.

The result of any such requirement would be the arbitrary destruction of the competitive traffic in which the railroad companies now engage with profit to themselves and without any injury whatever to any other person or locality; or, on the other hand, an arbitrary and sweeping horizontal reduction of all non-competitive rates, regardless of whether they are reasonable rates or not, and without inquiry, judicial or otherwise, as to their reasonableness, when the traffic officials of the railroad companies believe them to be reasonable and the general public admits that most of them are reasonable in and of themselves.

70 It may be added that in the territory with which the Louisville and Nashville railroad is concerned, south of the Ohio and east of the Mississippi river, where the traffic is much less dense than in the northern and eastern parts of the country, the maintenance of local, non competitive rates, at a considerably higher figure than the low competitive rates, and the right to engage at the same time in the competitive business at those low rates, are essential to the prosperity of the railroad companies. They cannot in that territory be properly required to reduce their local non-competitive rates to the basis of the long-distance competitive rates, nor can they afford to give up the revenue from the competitive business.

The effects just stated are true with respect to railroads in Kentucky as in all other States south of the Ohio and east of the Mississippi river, and are true with respect to the Louisville and Nashville railroad in Kentucky.

And thereupon counsel for defendant, for the same reasons urged by him in resisting the objection to the question, and still claiming under and relying on said subsection 1 of section 10 of article 1 of the Constitution of the United States, and on said section 1 of the fourteenth amendment thereto, for the reasons stated in resisting the objection to the question, moved the court to permit the witness to answer the question accordingly; but the court still decided each and all of said contentions against the defendant and refused to permit the witness to answer the question; to which ruling

71 of the court and to each and every part thereof the defendant at the time excepted and still excepts.

6 Q. If the requirements mentioned in the last preceding question were enforced within the State of Kentucky upon transporta-

tion performed wholly in Kentucky, state whether or not that would in anywise affect or interfere with railroad traf-ic between points in Kentucky and points in other States, or railroad traf-ic between points in other States passing through Kentucky.

Objected to by counsel for the Commonwealth.

Whereupon counsel for the defendant contended that said question was proper, and that said objection should be overruled, because the facts disclosed by the answer to said question would show that if section 218 of the constitution of Kentucky, or section 820, Kentucky Statutes, was so construed as to exclude competition from consideration as a circumstance and condition within the meaning of that law, they would amount in the present case, and also in a great many other cases, to a regulation of commerce among the several States, contrary to subsection 3 of section 8 of article 1 of the Constitution of the United States, and in conflict with an act of the Congress of the United States of February 4th, 1887, entitled, An act to regulate commerce.

And counsel for defendant further stated that the defendant relied upon immunity from such interference in interstate traf-ic, to which it was entitled by reason of said provisions of the
72 Constitution and statutes of the United States.

But the court decided said contention and every part thereof against the defendant, and sustained the objection of the plaintiff to said question, and refused to allow the witness to answer said question; to which ruling of the court and each and every part thereof the defendant, by counsel, excepted at the time and still excepts.

And thereupon counsel for defendant avowed that the witness if allowed to answer said question would answer truly as follows:

The requirement mentioned by you as to the rates on the shorter-distance tra-fic as compared with the rates on the longer-distance tra-fic in Kentucky is radically different from and under different control or regulation from the construction of the similar provision authorized to be applied on tra-fic from points in Kentucky to points in other States or between points in other States passing through Kentucky, and the result would be in many instances to affect the rates on interstate tra-fic and materially interfere with its movement.

The rates on similar kinds of freight passing from different points, whether State or interstate, to a common point of destination are not made and should not be made arbitrarily—that is, ignoring the fact that similar conditions call for a similar adjustment of rates; and if the rule as referred to is applied, the railroad, in order to not violate the provisions of the law with respect to
73 discrimination between shippers or localities or similar kinds of tra-fic, would be in many cases required to withdraw entirely from the transportation of such interstate tra-fic.

To illustrate:

Jellico is the terminus of the Knoxville division of the Louisville and Nashville road at the Kentucky and Tennessee State line in

Whitley county. It is an important producing and shipping point for coal. There are a number of mines shipping coal from or near the station. Some of these mines are in Kentucky and some are in Tennessee. If the construction of the long and short haul law be made as suggested, under which the rates from Kentucky points to Lebanon shall not be higher than to Louisville, then we would invite the anomalous condition of rates by which coal from a common shipping territory coming from mines owned by the same companies or adjacent mines owned by different companies would have to be moved at different and varying rates to a common point or points of destination. This would seem to involve discrimination prohibited between same kinds of tra-fic under the same conditions, or would involve the restriction or impairment of interstate commerce, if the rates from the Tennessee mines were advanced to Louisville to not lower than to Lebanon in line with the rates from the adjacent Kentucky mines.

Or, with regard to the Kentucky mines north of Jellico, in the vicinity of Altamont or Pittsburg, there would be a
74 grave discrimination in saying to the mines in Tennessee in the Jellico district they might continue to ship coal to Louisville at rates competitive with the river coals, while mines in Kentucky would not be permitted to ship coal to Louisville at rates that would permit of competition.

Middlesboro, Kentucky, is also a coal-mining point. The mines there are located along the line of what is known as the Middlesboro railroad. Some of these mines are in Kentucky and some in Tennessee. This coal is gathered up at different points along the Middlesboro line, and tendered to the Louisville and Nashville road for shipment at its yards or point for receiving coal in Middlesboro. It would be clearly an unjust discrimination to enforce a different set of rates from mines located in the same mining district to Louisville, or other points in Kentucky, and yet otherwise the facilities now enjoyed for the movement of interstate traf-ic from the mines just below the State line, in Tennessee, would be impaired or withdrawn because of the rates which the law, so construed, would require should be enforced from Kentucky mines in the same territory.

Coal is mined also on the line of the Cumberland Valley division of the Louisville & Nashville road, in Virginia, and is shipped to points in Kentucky, including Louisville. The rates from these mines are lower to Louisville than they are to some intermediate points, and are properly made with regard to the rates on coal from Middlesboro and from Jellico. A readjustment of the rates from Middlesboro and from Jellico to Louisville that would ex-
75 clude those mines from participating in the Louisville trade would call for a readjustment of the rates on coal mined in Virginia and shipped from points on the Cumberland Valley branch of the Louisville & Nashville road to the same point. If so, this would exclude the Virginia coals from the Louisville market, equally with the Jellico coals and the Middlesboro coals, and so would result in restricting or impairing the facilities for interstate

commerce, because of the application of the Kentucky law so construed to rates of the Louisville & Nashville road, a restriction or an impairment to which such interstate traf-ic is not now subjected, as it enjoys rates which permit of competition under the interstate-commerce law.

The dilemma presented to the managers of the Louisville & Nashville road, therefore, would be, under the construction of the Kentucky law as mentioned, whether to avoid the charge of unjust discrimination between shippers similarly located by applying the same rate on coal over the same line to the same point or points of destination, coming from adjacent territory in Tennessee and in Virginia, and thereby impair the facilities now enjoyed for interstate commerce and materially affect and impede the movement of such interstate traf-ic, or to subject the company to the charge of unjust discriminations and permit the interstate movement of coal from Tennessee and Virginia mines to Kentucky points as it now moves, while excluding Kentucky mines.

Other instances of similar anomalies are readily presented.

76 Competitive conditions exist at Lexington, Ky., which properly permit the railroad from Cincinnati to Lexington under the interstate-commerce act to make lower rates from Cincinnati to Lexington than to intermediate points. Yet, under the Kentucky requirement referred to, the same considerations would not permit the railroads from Louisville to Lexington to make a similar adjustment of rates.

Competition at Bowling Green, Kentucky, growing out of the navigation of Green and Barren rivers, requires interstate carriers under the interstate-commerce act to make low rates to meet that competition between Evansville, Indiana, and Bowling Green and between Cincinnati and Bowling Green, without compelling them to sacrifice the rates they charge on intermediate business. But the railroad company would not be allowed, under the conditions of your question, to make correspondingly low rates between Louisville and Bowling Green without reducing its reasonable rates to intermediate points under that Kentucky requirement.

Competition of boats in the Ohio river necessitates lower rates by rail between Louisville and Cincinnati than may reasonably and lawfully be charged to intermediate points, and under the interstate-commerce act the Kentucky roads can and do legally and properly charge more to the intermediate points than they do between these terminal points. Yet, under the Kentucky long and short haul law, the Kentucky railroads cannot charge any less between Newport and Covington, on the one hand, and Louisville, on the other, than is charged to the intermediate points, although the same conditions prevail at Newport and Covington as prevail at Cincinnati.

77 Competitive conditions of the same character exist at Evansville, Indiana, and Henderson, Kentucky. Under the interstate commerce act the railroads passing through Kentucky can lawfully recognize those competitive conditions at Evansville and make less rates between Kentucky points and Evansville than for the

shorter intermediate hauls wholly in Kentucky, when, according to that Kentucky rule, they cannot lawfully recognize the competition at Henderson or make such lower rates to and from Henderson.

Owensboro, Kentucky, by reason of its situation on the Ohio river, enjoys very low rates; but, under that requirement, Kentucky shippers cannot share in the trade of Owensboro unless the Kentucky railroads can reduce all the intermediate rates to the same low basis as the Owensboro rates, which would be impracticable; but points in other States can, under the interstate commerce act, continue to enjoy that trade, and, in fact, crowd the Kentucky shippers out of it, because an adjustment of rates may be made recognizing the competition at Owensboro without necessitating similar rates to intermediate points.

Maysville, Kentucky, and Ashland, Kentucky, on the Ohio river, can continue to enjoy low rates from Cincinnati and other points in other States without the railroads being compelled to reduce intermediate rates to the same low basis, but Louisville and other Kentucky places will be deprived of participation in trade with Maysville and Ashland, inasmuch as the Kentucky railroads cannot afford to reduce all intermediate rates to the same low
78 basis that must obtain with reference to Maysville and Ashland business, in view of the competitive facilities which those places enjoy.

In each of these cases and in countless others that could be enumerated the effects of the requirement referred to upon interstate commerce are apparent. The present relative commercial attitude of places in Kentucky and places outside of Kentucky will be materially altered, thereby necessarily affecting interstate commerce, and just so far as railroads may strive to prevent the unjust discriminations which will thereby arise in the same degree will the Kentucky requirement become a direct and controlling regulation with respect to strictly interstate traf-ic.

The enforcement of the Kentucky requirement would mean a decided impairment of the Louisville & Nashville Railroad Company's revenues and a corresponding impairment in its train service, to the detriment, not alone of State traf-ic, but also of the interstate traf-ic, since both characters of traf-ic are necessarily accommodated by the same train service. The direct and necessary effect of this would, of course, be a decided and unfortunate burden upon the interstate traf-ic as well as upon the State traf-ic.

And thereupon counsel for defendant, for the same reasons urged by him in resisting the objection to the question, and still claiming under and relying on said subsection 1 of section 10 of ar-
79 ticle 1 of the Constitution of the United States and on said section 1 of the fourteenth amendment thereto for the reasons stated in resisting the objection to the question, moved the court to permit the witness to answer the question accordingly, but the court still decided each and all of said contentions against the defendant and refused to permit the witness to answer the question; to which ruling of the court and to each and every part thereof the defendant at the time excepted and still excepts.

7 Q. Please explain the various sorts of competition which affect railroad transportation and how they affect that transportation. Are the instances rare or numerous where these various sorts of competition affect railroad transportation? State whether or not such competition affects the policy or convenience of the carrier only. If railroad companies could charge higher rates to or from intermediate non-competitive points and lower rates to longer-distance competitive points only when the right to give such recognition to competition were authorized by a railroad commission, would the action of such commission affect the convenience or policy of the carrier merely?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Counsel for defendant thereupon avowed that the witness, if permitted to answer the question, would answer truly as follows:

80 There are many and various sorts of competition affecting not the physical movement of the traf-ic nor the cost thereof to the carrier, but the rates that may be or should be charged for the service. There is competition, so termed, between markets. For illustration, coal mined on the Knoxville division of the L. & N. Railroad Co. is offered for sale not only at local stations in Kentucky, but at points or markets of consumption like Louisville, Lexington, Maysville, Covington, Newport, etc., where it meets the competition of coal mined in other parts of Kentucky, and in other States besides Kentucky, such as Pennsylvania, Ohio, Indiana, West Virginia. This competition with producing markets in other States having coal to sell in these different consuming centers controls the price—that is, the rate of transportation—that the Louisville & Nashville railroad may be able to secure from Altamont, Pittsburg, Grays, etc., to Louisville, Covington, Newport, Maysville, as the case may be. This competition between markets, widely separated, but producing the same commodity for sale at different points, is strongly illustrated in the case of rates on coal to Louisville, and equally so in the case of coal transported to other Ohio River points from Kentucky mines, such as Cincinnati, Covington, Newport, &c.

Pig iron manufactured in Alabama and Tennessee is sold at Chicago in competition with pig iron from Ohio, Illinois, and Wisconsin. Southern pig iron seeks markets of consumption throughout the North and West as well as in the East, and makes the
81 competition of pig iron produced in Illinois, Ohio, Virginia, Pennsylvania, &c. The competition between these widely separated markets of production at common points of consumption is a condition affecting the rates that can be secured for transportation.

Lumber from Indiana competes with lumber from Kentucky at Cincinnati, Evansville, Louisville, etc.

Pine from Arkansas and Mississippi comes into competition with pine from Michigan. These are controlling factors in fixing the rate that can be secured for moving lumber from these several com-

peting markets, factors which, on account of different conditions and circumstances, affect the transportation, although not incidents connected with or controlling the physical movement of the commodity.

Then there is the competition between carriers—that is, between the same or different kinds of transportation, whether that be by means of rail, river, or wagon. The L. & N. railroad is engaged in transportation by rail, but on an appreciable part of its traffic wagon competition is a controlling element in establishing conditions which fix the rates that can be secured by it. Competition with steamboats plying navigable streams is among the most effective of all kinds of competition as affecting rates on account of its cheapness. So the question of competition is not by any means limited as to whether or not there are two or more railroad lines competing or crossing at a given point or running between
82 the same points of origin and destination. On the contrary, competition with wagons or with steamboats is, in many cases, as effective in creating or controlling conditions which affect rates as is competition between two or more railroad lines. The competition to which I have reference, whether between markets or between different kinds of transportation, is marked and controlling at so-called local stations as well as at junction or competitive points, meaning, in this use of the word, those points where two or more rail lines connect or compete. By local stations I mean a station that is reached by only one railroad line, such as Lebanon, Kentucky. Competition exists and has its effects upon the rates that may be charged to and from such points. For instance, the Louisville & Nashville railroad desires, in the proper promotion of the interests of communities and industries on its lines, to transport coal from mines at Pittsburg, Altamont, or Grays to Lebanon, and to afford reasonable inducements to those living at Lebanon to buy their coal at those or other adjacent Kentucky mines. It must, therefore, adjust its rates with a knowledge that coal is brought to Louisville by the Ohio river at a nominal cost for transportation and sold at Louisville for consumption there and shipment beyond at low prices, and if the rates from Pittsburg, Altamont, Grays, and other mining points on the Knoxville division and Cumberland Valley branch are not properly adjusted, such coal so offered and sold on the Louisville market from Pennsylvania and West Virginia could be and would be shipped from Louisville to Leb-
83 anon in place of the coal from Pittsburg, Ky., Altamont, &c.

The rates that may be charged from so-called "local stations" on the Cincinnati Southern railroad, for illustration, on live stock to Cincinnati, Louisville, etc., are affected or controlled by the rates that are charged from so-called "local stations" in same territory on the Knoxville division of the Louisville & Nashville railroad on live stock to same points.

Numerous other illustrations might be given as to competition between the carriers affecting rates from what we generally term and what in the public mind are usually considered as local stations.

There are other kinds of competition. One of them is sometimes defined as competition between products. That also has an influence over rates. I mean the question of bringing into the market of consumption one kind of freight or commodity in competition with another. Coal comes into competition with wood, and, in many cases, also into competition with coal oil and gas, as a fuel. Bran and ship stuff, corn and oats from the West, come into competition at different points in the South with cotton-seed meal as stock feed.

Building stone from Bowling Green quarries in Kentucky or Bedford quarries in Indiana comes into competition in the East with granite from Vermont for building purposes, and this condition is a matter affecting rates that can be secured and deciding the question whether Indiana or Kentucky stone can or will be used by the architects and builders in Washington, New York, Philadelphia, etc.

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For street-paving purposes vitrified brick, granite blocks, wooden blocks, and asphalt are all in competition. Other things being equal, the cost at which these commodities may be delivered at point of consumption will decide the matter, and this question becomes the controlling factor in the matter of rate that can be secured for hauling the granite, the wooden paving blocks, or the brick from point of production to point of consumption. At the present time the matter of paving material from Alabama to New Orleans by rail is being considered with respect to the conditions existing as to the delivery of other paving materials such as asphalt by water at New Orleans. This competition at that point more directly controls or more sensibly affects the rates than it would at some interior point not located on a water-course as New Orleans is. The competition, however, still exists at interior points on these commodities different in degree, but not in kind, and the same circumstances and conditions would have to be and are considered in fixing the rates at such interior points. It will be seen, therefore, that the instances instead of being rare are numerous where these various sorts of competition affect railroad transportation and the rates charged. It must be apparent that these conditions of competition do not effect the policy or convenience of the carrier only. On the contrary, they very materially affect the interests of the shipper and the consumer and of all communities involved. This effect is in some aspects felt more and is probably relatively greater in considering the competition affecting rates at a point like Lebanon than at a point like Louisville, because the city of Louisville is so fully supplied with transportation facilities and has access to so many markets from which to obtain its supply of coal and other commodities that the adjustment of rates on coal, for instance, by the Louisville & Nashville railroad to Louisville from its Kentucky mines would not materially affect or control the question of fuel supply to Louisville consumers. Moreover, it is an important question to the producers and shippers of coal-operating mines along the line of the L. & N. railroad, and the proper consideration of these conditions is a matter

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of material interest to the consumer of coal at Lebanon. It follows with equal truth that the right to meet the situation growing out of these different kinds of competition, and to give recognition thereto only as authorized by the railroad commission, whether such action of the commission be for or against the right and authority of the railroad to charge higher rates to or from intermediate non-competitive points, affects the convenience, welfare, or policy of a large number of interests besides those of the railroad company. The carrier is not the only one involved, but, on the contrary, the shipper and the consumer are equally interested in the proper decision of the question as to the
86 dissimilarity of the circumstances and conditions and the rates properly to be charged under such dissimilarity. It is not perhaps too much to say that the entire investment in coal operations at Grays, Altamont, Pittsburg, and other points along the Knoxville division of the Louisville & Nashville railroad and the returns legitimately to be expected therefrom would be dependent, under such a condition of affairs, upon the decision of the commission of the State of Kentucky as to the right of the railroads to charge such rates to Louisville, Newport, Covington, Maysville, etc., as will permit such mines to share in the coal trade at these points, and therefore affect not only the investment of the owners of those mines, but of many thousands of miners engaged in their operation and of the widely extended lines of interests connected therewith.

The court still refused to permit the witness to so testify or to answer the question; to which action of the court the defendant, by counsel, excepted at the time and still excepts.

8 Q. Does the fact that a railroad company can haul competitive traf-ic at low rates without loss show or tend to show that it can haul non-competitive traf-ic at similar rates without loss, or does it show or tend to show that the rates for the non-competitive traf-ic are too high or are relatively unjust?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.
87 Counsel for defendant thereupon avowed that the witness, if permitted to answer said question, would answer truly as follows:

In my judgment it does not either show or tend to show such a result. I have indicated that a large part of the total expenses of a railroad consists of fixed expenses not dependent upon the amount of business handled, or, if so, only changing in a very slight degree, many of them not subject to change at all. Now, these expenses have to be paid from the total revenue of the company. The railroad companies have no sources of revenue except earnings from the traf-ic passing over their lines, from the freight, passenger, mails, and express business. If, therefore, a railroad company, having fixed its local tariff at a fair and reasonable figure, continues to charge that tariff while it may get other business which pays it less

than its local business proper, it is evident this addition to the gross receipts of the company finally results in benefit to the local points. In other words, a railroad built to accommodate the several communities in the territory through which the line runs fixes its rates and offers its services for transportation. In every case those rates are lower than the communities previously paid for much inferior facilities, if the railroad runs through a territory in which railroad transportation is necessary, and the railroad has a right to expect that the communities tributary to it shall produce sufficient traf-ic from which to secure the necessary revenue to pay a reasonable return on the investment,
88 maintain the property, pay the operating expenses, taxes, etc. If, after the construction of such a line, the management of that company finds that it can secure additional business from communities not tributary to the line, not dependent upon the line, from which additional business it will secure additional revenue not previously contemplated, it follows that no one is injured. The communities for whom the line was built certainly are not in any way imposed upon, and the railroad company secures some benefit from the additional revenue thus derived, and the final result is that in handling this through traf-ic, as it may be termed, and enjoying the revenue thus secured, the railroad company is enabled to make lower charges to its local communities and give improved service in the way of better road-bed, more trains, faster trains, better equipment, etc.

The court still refused to permit the witness to answer the question or to so testify; to which, the defendant by counsel, excepted.

9 Q. State whether or not rates are or can be fixed with reference to actual cost of transportation estimated with reference to necessary outlays and expenditures in carrying passengers, loading, moveing, and unloading freight trains, or fixed at all with reference to the actual cost of transportation.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.
89 Counsel for defendant thereupon avowed that the witness, if permitted to answer said question, would answer truly as follows:

It is not practicable to ascertain the cost of loading, moving, and unloading freight trains as a part of the total expenditures necessary to operate and maintain a railroad property, much less is it possible to estimate the cost of moving any particular commodity, whether by the ton, package, or hundred pounds, between some two designated points taken out of the entire operations of the railroad line. If for no other reason than the impracticability, rates are not and cannot be made with reference to the so-called actual cost of transportation. The cost to the railroad company is an unknown factor. No statistics, however elaborate, have yet been compiled to show what the cost will be at some time in the future of moving a particular article from one point to another, handled as it is, as a

part of the general business of the railroad. The railroad company does keep statistics to show what might be termed an approximate or alleged cost per unit of tons handled, for all freight, for a period of twelve months or other period, but these statistics, even in their imperfect shape, simply report the expense incurred bythe company in transactions already completed, while the freight rates have to be made in advance and in anticipation of a movement that is indefinite, uncertain, and in the future. The alleged cost of transportation as used in railway statistics is compiled, not with any view of
90 governing or controlling rates to be assessed in the future on an indefinite movement of traf-ic, but is considered by the management for the purpose of comparing from year to year or from month to month the result of operations with respect to whether the property is being handled economically or extravagantly. As there is no possible way of figuring the cost of the movement of any one class of freight even between all the points on a railroad, so there is no way of figuring the cost of movement of any one class of freight between any two points on a railroad, and therefore the question of cost cannot be taken and is in no case in any part of this country taken as a controlling factor in the fixing of charges for the transportation of freight. Railroad statistics use the expression "the average cost per ton per mile" or "average expense per ton per mile," and that is simply to reduce to a unit for convenient reference and comparison from time to time the total expense paid by a railroad company in handling its property. That average expense per ton per mile is used to represent the cost of moving one ton per mile. That is what is intended to be shown or approximated, but it does not mean and was never intended to mean the expense of moving any one particular ton over any one particular mile of road. It is arrived at by taking the entire tonnage of freights handled during the period of twelve months or one month, as the case may be, multiplying each ton so carried by the distance it was carried and dividing the results so arrived at into the oper-
91 ating expenses. This number of tons carried one mile, therefore, is made up of all of the hundreds of thousands of transactions, including the movement of a car-load of coal, for instance, from the mine five or ten miles to a coke plant, a box of dry goods, boots and shoes, silks, or a car-load of pig iron, which may move 300, 500, or 1,000 miles over the same road. It varies from the transportation of a car-load of tea worth many thousands of dollars to the transportation of a car-load of mill cinder or slack coal of little or no value at all. There is no way in which the statistics can be kept that would show, therefore, the cost of transporting coal as one of the instances in the entire service performed by the Louisville and Nashville railroad from Pittsburg, Ky., to Lebanon, taken in connection with and as part of the entire freight movement of the Louisville and Nashville railroad. Moreover, the expenses which are assigned to the freight department are, in many cases, and of necessity have to be, arrived at largely in an arbitrary manner. There are some of the expenses which are directly incurred in the movement of freight, as, for instance, the expense of

engines and cars in freight trains, the wages of engineers and firemen on freight trains, wages of agents, clerks, and laborers whose duties are confined exclusively to the freight business; but at the same time there are going on and have to be paid by the company large expenses not directly in connection with either the freight or the passenger business. That would include superintendence; large sums annually expended in the
92 maintenance of track—that is, the repairs and renewals of rails, cross-ties, ballast, ditching, reconstruction of bridges, culverts, and numerous other expenses connected with the road department, which cannot be accurately assigned to either passenger or freight. A very large percentage of the total number of agents employed by any railroad company perform duties both for the passenger and freight departments. The supervision of the operations, of superintendence, includes passenger and freight. The expense for interest, taxes, and other obligations are not incurred by one or the other department, but are joint. Those are only a few illustrations of the reasons why it is impossible to ascertain the actual cost of moving any one ton of any particular class of freight between any two designated points.

The court still refused to permit the witness to answer the question or to so testify; to which action of the court the defendant, by counsel, excepted.

10 Q. In what way, if at all, can the mine-operators, miners, coal-consumers, or the general public be concerned with the cost to the railroad company of the transportation of coal?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Counsel for defendant thereupon avowed that the witness, if permitted to answer the question, would answer truly as follows:

93 Not at all. Rates are not fixed with reference to the cost of transporting any particular article of freight between two or more designated points. They are fixed by conditions which have heretofore, somewhat at length, been referred to. The public is interested in knowing that those conditions are properly considered, so that their charges may be correspondingly and properly adjusted. They just to an equal extent have no interest, therefore, in the question of cost to the railroad company of transporting coal. Not only mine-operators, miners, coal-consumers, but the general public are interested in having their rates so adjusted that they can continue to do business to the satisfaction of themselves and their customers and at a reasonable profit. They have no more interest in the cost of transporting coal than they have in the cost of transporting flour, or dry goods, or wagons, or any other of the thousand articles that go to make up the freight business of a railroad. They are interested in the railroad's securing sufficient revenue to properly maintain its road and equipment, pay its obligations, and give good and efficient service.

The court still refused to permit the witness to so testify or to answer the question; to which ruling of the court the defendant, by counsel, excepted.

11 Q. Please state the various accounts which go to make up the operating expenses of a railroad company, and show, if you can do so, the relation which those accounts bear to each other in amount, and the relation which they bear to the fixed
94 charges and other expenses of a railroad company which are not embraced in operating expenses.

A. The operating accounts of railway companies are, as a general rule, divided into four main accounts or general headings, in accordance with formulas prepared and directed to be used by the Interstate Commerce Commission. These are designated maintenance of way and structures, maintenance of equipment, conducting transportation, and, fourth, general expenses. Under these four general operating expense accounts there are, in the accounts of the Louisville & Nashville railroad, 56 sub-accounts. In each one of these sub-accounts a great number of items enter to make up the total expenses under each sub-account and the total expenses under each general account, and, finally, the total of the operating expenses. It has been claimed that in some cases the additional cost of handling new or additional traf-ic is very slight. By additional cost I mean the actual additional expense incurred on account of moving that specific freight. This is because there are many elements of operating expenses which do not vary in line with or do not vary at all with the actual tonnage of traf-ic handled. Of the total expenditures incurred by the Louisville & Nashville railroad for the fiscal year ending June 30th, 1898, the operating expenses aggregated 71.21 per cent.; taxes, State, county, and municipal, 3.06 per cent.; interest on bonded debt, discount, payments account leased and controlled lines, 25.73 per cent. Of the total expenditures, therefore,
95 necessary to the operation and maintenance of the property, it appears on first consideration alone that 28.79 per cent. have no relation to and are not in any way controlled by the volume of traf-ic handled, nor whether the same is increased or decreased, being made up of interest, discount, payments to leased lines, taxes, &c. Of the remaining accounts it is equally apparent that the general expenses of superintendence or supervision, including salaries, clerk hire, office rent, office expenses, of officials, such as the president, vice-president, secretary, treasurer, general manager, traf-ic manager, general freight agent, general passenger agent, comptroller, auditors, chief engineer, division superintendents, superintendent of machinery, etc., which amount to 5.39 per cent., are not related to or controlled by the volume of traf-ic handled. Under the general headings of maintenance of way and structures, maintenance of equipment, and conducting transportation, the following represents the percentage that each of these accounts bears to the total expenditure of the Louisville and Nashville railroad for the fiscal year ended June 30th, 1898:

96 *Maintenance of Way and Structures.*

Main track and roadway	4.51
Side track and switches	.80
Cross-ties, renewals of	2.10
Rails, renewals of	.90
Watchman of track and bridges	.37
Bridge and culvert repairs	2.49
Depot repairs	.36
Shop-building repairs	.28
Section-house repairs	.10
Water-station repairs	.22
Dredging and repairs of docks and wharves	.06
Telegraph repairs	.01
Extraordinary expenses—washouts, etc	.97
Improvements—way and structures	2.02
Total	15.19

Maintenance of Equipment.

Locomotive repairs	4.54
Passenger, baggage, express, and postal car reprs	1.48
Freight car repairs	7.22
Sleeping car repairs	.003
Shop machinery and tools	.19
Improvements—equipment	1.13
Total	14.57

Conducting Transportation.

Conductors, baggagemen, and brakemen	5.23
Hire of locomotives and cars	1.47
Injuries to employés	.58
Injuries to persons (not employés)	.64
Engineers and firemen	4.39
Round-house expenses	1.24
Oil and waste used by locomotives	.16
Water for locomotives	.34
Fuel for locomotives	5.87
Loss and damage:	
Baggage	.001
Freight	.48
Property	.12
Stock killed	.62

97 Station expenses:

Agents and clerks	2.41
Baggagemen, porters, furniture, fuel, lighting, &c	.58
Labor—loading and unloading freight	1.22
Watchmen at depots and crossings	.31

Switching:	
Switchmen	2.02
Engineers and firemen	.92
Locomotive repairs	.48
Round-house expenses	.03
Oil and waste	.03
Water supply	.05
Fuel	.77
Sleeping car hire	.25
Sleeping car expenses	.17
Train expenses:	
Inspecting cars, cleaning, oil and waste, lighting, heating, links and pins, train supplies	1.85
Telegraph expenses	1.02
Wrecks (clearing)	.21
Advertising and soliciting	1.01
Rents (tracks, yards, and terminals)	1.58
Total	36.06

I have shown that of the total expenditures of the railroad company, 34.18 are not connected with nor affected by the question as to whether the tonnage of coal or any other commodity is increased or decreased. Now, these expenditures, such as I have above stated, representing the remaining expenses in the operation of the property, amount to 65.82 per cent. As a general thing, the title or heading of the account tends to show pretty clearly the nature of the expense involved. And it will be seen that only a small part of these expenses is increased and only a small part decreased as the volume of business handled is increased or decreased. To illustrate, in maintenance of way and structures, expenses for repairs of road-
way, repairs or renewals of bridges and culverts, repairs and
98 renewals of fences, repairs or renewals of telegraph, have no connection or fixed relation to the volume of traf-ic. Taking these question- of rails, while it is true the expense for the renewal of rails might be increased or decreased by changes or fluctuations in the tonnage of business over the road, to what extent that is the case it is impossible to estimate. Under the same general heading will be observed accounts for repairs and renewals of buildings, docks, and wharves, dredging, improvement to the permanent way and to structures, telegraph repairs, and extraordinary expenses, which are not dependent upon or affected by the volume of freight. In the next general heading, maintenance of equipment, there are five sub-headings. Some of these are wholly independent of the volume of business handled. There are, of necessity, fixed expenses in the maintenance of equipment, whether it is in active service or not. There are 31 sub-headings set forth in the next schedule, under the heading of conducting transportation. Some of these may be decreased or increased according to the volume of business handled; such, for instance, as the wages

of trainmen, fuel for locomotives, train supplies, train expenses; but the expense of telegraph service, switchmen, flagmen, watchmen, rents, as well as a number of other items going to make up the total which is under that head, are not affected by the fluctuation in the volume of business.

Thus, unfortunately, the expenses cannot be decreased in line with the changes in business, except to a very limited extent.

99 There is one important and controlling condition in this question of the cost of moving, loading, and unloading freight trains, and that is, even where it is practicable to assign a portion of the operating expenses as being of such a nature as to be increased or decreased by whether certain traf-ic is handled or is not handled; the statement shows that there is no division of these expenses, as a general thing, between the passenger and freight departments—that is, as to the expenses of handling passenger trains and the expenses of handling freight trains. Attempts are made by arbitrary rules for matters of convenience by many companies to assign expenses as between passenger and freight respectively. So uncertain are these results and so little value is attached to them that the Interstate Commerce Commission, through its statisticians several years ago, after investigation, issued instructions to railway officials that thereafter no attempt should be made to apportion the expenses in the operations of railway properties as between passenger and freight.

12 Q. Please give, if you can do so, the number of articles which is embraced in the classificarion of freight, and give an idea as to the variation between the highest and lowest rates on articles of different classes for any given distance.

Objected to by counsel for the Commonwealth as having nothing to do with this question, the only inquiry being as to one class of freight, coal, between two points.

100 The court sustained said objection; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

The number of articles covered by different classifications on different railroads vary, say from about 2,800 to 3,500. Probably more than that number of articles are named in some classifications. My recollection is that the local classification of the Louisville and Nashville railroad contains something over 2,800 to 3,000 different articles, besides in many cases reference to articles similarly classified or analogous articles. The variation between the highest and lowest rates on articles of different classes for a given distance is very wide. For instance, the local freight tariff of the Louisville & Nashville railroad for 100 miles provides a charge on first-class freights of 55 cents per hundred pounds. Its rate for the transportation of coal that distance would probably amount to 7½ cents per hundred pounds. Coal is one of the lowest articles of transportation, but sand, brick, cement, lime, and other low-class freights are also carried at correspondingly low rates. On the other

hand, many articles of merchandise take a higher rate than first class—some of them double first class, and some three times first class. The variation in rates, therefore, from this illustra-
101 tion of local tariff would be as between, say, $1.65 per hundred pounds to 7½ cents per hundred pounds for transportation of different classes of freight between the same points for a distance approximating 100 miles, or in the proportion of over twenty to one.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

13 Q. State whether or not this variation is or can be in proportion to the difference in the cost of transportation, and, if not, state how the different rates for different classes are established, and how the various commodities which are the subject of transportation are apportioned among the various classes?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

This variation is not and cannot be fixed in proportion to the difference in the cost of transportation. The assignment of three or four thousand articles of transportation to a few classes involves of necessity a more or less arbitrary exercise of good judgment and discretion, and the classifications of the country are the result of many years of experience, aided by numerous conferences
102 between railroad officials and between railroad officials and shippers, manufacturers, consumers, and others interested. In no case in my experience has it been attempted to define or fix the classification of any article under which classification a rate would become fixed or affected by the question of cost of transportation. The relative value of the article to be transported is at times considered. The value of the service performed is a consideration. The character of the article to be carried and the shape in which it may be offered for transportation is a circumstance affecting the classification. The bulk of the article and its value as related to bulk or space occupied is considered. While I speak of the arbitrary exercise of judgment, yet every effort is made by railroad officials to ascertain all the facts bearing upon the question of classification of any one article, and frequently experts are employed for the purpose of carefully and correctly getting together all of the available information from which to form a correct conclusion. It is quite apparent that the classification is not to be fixed by the question of cost, because, once adopted, it must apply over many different lines in different sections of the country or in different parts of the same territory, where the transportation cost may vary each day in the year and for each portion of the line over which transported. The mere cost incident to movement may, aside from the question of risk involved and

claims to be paid in the event of accident, be practically the same for a car-load of tea weighing 20,000 pounds
103 and a car-load of lumber, yet no one would expect, because of this equality in "cost of moving, loading, and unloading," that a car-load of tea should be hauled for as low a price per hundred pounds as a car-load of lumber. There may be no immediate greater cost in moving a car-load of dry goods, worth many thousand dollars, over the moving of a car-load of pig iron between the same points of origin and destination, yet it would be impracticable for the railroads and unjust to the shippers to charge as much for the car-load of pig iron as for the car-load of dry goods, or, on the other hand, to haul a car of dry goods for as low a rate as the railroads might be willing to haul a car-load of pig iron. There may be no appreciable difference in the mere cost of moving a car-load of feathers or wool and a car-load of coal, one an article of very light bulk and great value and the other an article of low value, but it would be unjust to carry wool or feathers between any two points for the same rate as might be charged for the carriage of coal.

14 Q. What difference in kind is there between the factors which determine the rates to be charged on different commodities between the same points and the rates to be charged on the same commodities between different points, when one of these points is a competitive point and the other is a non-competitive point?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

104 Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

There is no difference in kind between the factors to determine the rates to be charged on different commodities between the same points and the rates to be charged on the same commodities between different points, when one of those points is a competitive point and the other a non-competitive point. There may be different degrees or different elements of comparison, and there are, of course, a greater or less number of considerations, at times, to be given in deciding one or the other of such questions. The final conclusion has to be reached by the same or similar consideration of the same or similar conditions, and that is the circumstances and conditions affecting the rates that may be properly charged or secured for transportation.

In the decision necessary to be reached in fixing classification and assigning the different articles or commodities to be transported to one of the half-dozen classes in such classification, the factors determining may and do, in many cases, become extremely intricate. On the other hand, it is at times possible to very clearly show, as in the case of coal from Pittsburg, Ky., to Louisville, exactly what can be secured for transportation, and what can therefore properly be charged for such transportation,

and permit the tra-fic to move, assuming that by the use of
105 your terms you mean, in the one case, Lebanon, as a non-competitive point, and, in the other case, Louisville, as a competitive point.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

15 Q. State the circumstances and conditions other than those, if any, relating to cost of service under which coal was, in October, 1894, and is now, transported from Altamont to Elizabethtown, and wherein those conditions differed, if at all, from the conditions affecting the transportation of coal from Altamont to Lebanon; and state the effect at that time of the recognition by the railroad company of the conditions affecting the transportation to Elizabethtown, with reference to transportation to that point, which did not affect the transportation to Lebanon, and what would be the effect of denying the railroad company the right to recognize those conditions.

Counsel for the Commonwealth objected to circumstances and conditions outside of those affecting the cost of transportation.

Counsel for defendant resisted said objection and claimed that the question was proper, and that the facts which would be disclosed by the answer thereto would be relevant and competent under a proper construction of section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes.

106 Counsel for defendant further stated that the defendant claimed, under section 1 of article 14 of the amendments to the Constitution of the United States, prohibiting any State to deprive any person of property without due process of law or to deny to any person within its jurisdiction the equal protection of the laws, the right, under the circumstances which would be disclosed by said answer, to transport coal from Altamont and other coal-shipping points to Lebanon at the rate of $1.55 per ton or other just and proper rate, and at the same time to transport coal from Altamont and other coal-shipping points to Elizabethtown at a less rate.

That section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes if so construed as to prevent said practice under the circumstances which would be disclosed in the answer to said question, would have the effect, arbitrarily and without any justification or excuse, of compelling the defendant to give up such transportation of coal to Elizabethtown and the revenue accruing to it therefrom or of requiring the defendant, arbitrarily and without any justification or excuse, to reduce materially its rates on coal from Altamont and other coal-shipping points to Lebanon and other intermediate points without any inquiry, judicial or otherwise, to ascertain whether said last-named rates were unjust or unreasonable, and when in fact reasonable, and that therefore said con-

stitutional and statutory provisions of the State of Kentucky,
107 so construed, are unconstitutional and void because in conflict with the aforesaid provisions of the Constitution of the United States.

The defendant, by counsel, further contended that by reason of the contract existing between it and the Commonwealth of Kentucky, resulting from the acceptance by it of the charter granted to it by the Commonwealth of Kentucky, it had the right to engage in the transportation of traf-ic, and to receive revenue therefor, of which right the Commonwealth of Kentucky could not deprive it; that if the character of traf-ic to be accepted by it or the rates to be accepted for such traf-ic could be subject to regulation at all by said Commonwealth of Kentucky, it could only be a just and reasonable regulation, having for its objects the promotion of the public welfare, and that any arbitrary regulation, either requiring the defendant, without any justification or excuse, to give up entirely the transportation of coal from Altamont and other coal shipping points to Elizabethtown, or of requiring it, arbitrarily and without justification or excuse, to reduce materially its rates on coal from Altamont and other coal-shipping points to Lebanon and other intermediate points, without any inquiry, judicial or otherwise, as to whether said last-named rates are unjust or unreasonable, and when in fact they are reasonable, would be an impairment of the obligation of said contract, contrary to subsection 1 of section 10 of article 1 of the Constitution of the United States, pro-
108 hibiting any State to pass any law impairing the obligation of contracts; and counsel for defendant stated that the defendant relied upon the right and immunity guaranteed to it by said subsection 1 of section 10 of article 1 of the Constitution of the United States, and that the facts which would be disclosed by the answer to said question would show that section 218 of the Constitution of Kentucky and section 820 of the Kentucky Statutes, if construed so as to exclude from consideration the facts which would be disclosed by said answer, would impair the obligation of said charter contract, as above stated.

The court, however, decided each and all of said contentions against the defendant, and sustained the objection of the plaintiff to the question, and refused to allow said question to be answered; to which decision and ruling of the court and to each and every part thereof the defendant, by counsel, at the time excepted and still excepts.

And thereupon counsel for defendant avowed that the witness, if allowed to answer said question, would answer truly as follows:

Elizabethtown, Ky., is a junction point between the Louisville and Nashville railroad and the Illinois Central railroad, as stated. It is nearer to Louisville than Lebanon is, and Elizabethtown, before the opening of coal mines and the shipment of coal from mines in Kentucky, secured such coal as it used from Louisville, and
109 had lower rates than would be charged for the shipment of coal from Louisville to Lebanon. Mines are in operation on

the line of the Illinois Central railroad, which are much nearer to Elizabethtown than are the mines on the Knoxville division of the Louisville & Nashville railroad, and are daily shipping coal to that point, and the Louisville & Nashville railroad, in shipping coal from mines on its line in the vicinity of Pittsburg, Altamont, or Grays, Ky., finds that its rates are controlled by these conditions, namely, the possible shipment of coal from Louisville to Elizabethtown, which has been brought into Louisville by river from Pennsylvania or other points, and the continued shipment of coal from mines on the Illinois Central to Elizabethtown, and the rates on coal to Elizabethtown, therefore, while higher than to Louisville, are, under these conditions, it may be, lower than to Lebanon. The transportation to Lebanon is not affected by any such conditions. The mines at Altamont are the nearest mines to Lebanon, and consequently neither the rate of transportation nor the transportation itself to Lebanon is affected by any such condition as above stated with reference to Elizabethtown. The effect of recognizing the competition at Elizabethtown is similar in kind, though different in degree, to the effect of recognizing it at Louisville, and gives to the railroad company an additional revenue and to the Southeastern Kentucky coal mines an additional market without effecting any
110 injury to any place. To deny to the railroad company the right to recognize this competition at Elizabethtown would either force it, arbitrarily and without justification or excuse, to give up that traffic to Elizabethtown or compel it, arbitrarily and without justification or excuse, to reduce materially all intermediate rates, without any inquiry, judicial or otherwise, to establish the unreasonableness or injustice of such intermediate rates, and when such intermediate rates are, in fact, just and reasonable.

And thereupon counsel for defendant, for the same reasons urged by him in resisting the objections to the question, and still claiming under and relying on said subsection 1 of section 10 of article 1 of the Constitution of the United States and on said section 1 of the fourteenth amendment thereto, for the reasons stated in resisting the objection to the question, moved the court to permit the witness to answer the question accordingly, but the court still decided each and all of said contentions against the defendant and refused to permit the witness to answer the question; to which ruling of the court and to each and every part thereof the defendant at the time excepted and still excepts.

Counsel for the Commonwealth declined to cross-examine.

111 JOHN B. ATKINSON, called for the defendant, being duly sworn, testified as follows:

Direct examination by Mr. HINES:

1 Q. Where do you live? What is your occupation, and how long have you been so engaged?

A. I live in Earlington, Kentucky. I am president of the St. Bernard Coal Co., and also of the Whitley Coal Company of Ken-

tucky, and I have been engaged in the coal-mining business for twenty-seven years, in Kentucky.

1*a* Q. Where does the St. Bernard Coal Co. have its mines?

A. In Hopkins county, Kentucky.

1*b* Q. And where does the Whitley Coal Co have its mine?

A. In Whitley county.

2 Q. Please state how, if at all, are the transportation of coal and the rates charged therefor by railroad companies connected with the coal trade itself.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

Intimately connected, because most of the coal mines of the United States are located on lines of railroads necessarily used to transport the coal to market; because the transportation of coal in this country requires more cars and engines than does any other profit. The coal tonnage is eighty times greater than that
112 of the cotton crop, sixteen times greater than that of the wheat crop, four times greater than that of the corn crop, and twenty times greater than that of pig iron. Only a small per cent. of the coal produced is sold to the local trade, the greater part of the output of the mines being shipped to terminal competitive points. The freight on coal is an important matter to the coal miner, and a successful operation of the mines depends to a very large extent upon the freight rates. In shipping to competitive points, unless the freight rates are such as enable the coal-operator to put his coal of same quality at such points as low as the miners of other coal-fields, he will be excluded from such market. The coal-mining industry is, therefore, closely connected with transportation by rail, and must depend on the railroads for successful operation. Price of coal in any market depends more on the cost of transportation than on the price of production. The cost of mining and putting the coal on the railroad cars varies but little in any of the coal-fields of the United States; hence the cost of coal in any market depends upon the cost of transportation to that market. To further illustrate: If one coal-field is located 100 miles by railroad from the competitive market, and another coal-field is 200 miles from this market, the quality of the coal being equal, then the transportation charge for carrying this coal must be the same as that charged for carrying the coal 100 miles, in order that the coal brought the greater distance may compete in
113 that market. If the rate be not made equal, then coal from the mine 200 miles distant will be shut out.

The court still refused to permit the witness to answer the question or to so testify; to which the defendant, by counsel, excepted.

3 Q. State to what extent, if at all, you are familiar with the transportation of coal between the Kentucky mines and Louisville,

and between southeastern Kentucky mines and Lebanon, and with the conditions of the coal trade at those places.

Counsel for the Commonwealth objected to the form of the question.

By the COURT: He has the right to state as to his knowledge.

By Judge RIVES: We objected to that part in regard to the coal trade. We do not object to that part of the question which asks if he is familiar with the transportation of coal between the Kentucky mines and Louisville or between southeastern Kentucky mines and Lebanon, but we do object to that part which asks if he is familiar with the coal trade at those places, because that has nothing to do with the question.

By Mr. HINES: We ask the ruling of the court on the question as propounded.

By the COURT: Then I will overrule the motion, but I will have to control the witness in answering. Mr. Atkinson, in making your response to that question you can answer so much of
114 the question as to your familiarity and knowledge as to the transportation between points indicated in the question, but you will not give your knowledge as to the condition of the coal trade at the points indicated in the question.

To the ruling of the court the defendant, by counsel, excepted.

A. I am familiar with the transportation to Louisville, because I ship coal to Louisville from mines at St. Charles, Ky., and also ship coal from Whitley county to Lebanon and Louisville.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question fully, would answer truly as follows: I am also familiar with the conditions of the coal trade at those places. I know that the prices at the Louisville market are made by the river coal operator, who brings his coal by river from Pennsylvania and West Virginia mines. The prices made at Lebanon are made by the mine operators at Altamont and other southeastern Kentucky coal operators.

The court still refused to permit the witness to answer the question fully or to so testify; to which ruling of the court the defendant, by counsel, excepted.

4 Q. State whether or not in 1894 coal was or could have been transported from those mines or any of them to Louisville under circumstances or conditions similar to those under which it was transported from the same mines to Lebanon. What have
115 been the facts in this regard since 1894? Explain fully.

Counsel for the Commonwealth objected to so much of this question as asks for circumstances and conditions other than those immediately affecting the cost of transportation service. The court sustained said objection; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question fully, would answer truly as follows:

During 1894, and at all times since, coal could not have been transported from southeastern Kentucky mines to Louisville on conditions similar to those under which it was transported to Lebanon. Sales of coal in Louisville from Ohio River mines have been at such prices as would prevent the sale of coal from southeastern Kentucky if the rate of transportation to Louisville had been the same as to Lebanon.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

5 Q. Please state at length the conditions prevailing in 1894 and now in the coal market at Louisville. What controlled the price of coal on the Louisville market? Explain the facilities for transporting coal down the Ohio river to Louisville.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

116 Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

Louisville gets its supply of coal from Pittsburg, Pa., and from West Virginia by means of river transportation, and from Indiana and western and southeastern Kentucky by rail. Coal from Pittsburg, Pa., to Louisville, about 500 miles by river, is transported in barges and boats for less than 50 cents per ton. This low rate of transportation fixed the selling price of coal in Louisville, and this condition existed during 1894 and has existed ever since. It means that all railroads that transport coal to this market must make low rates, else the miners on the said railroads will be kept out of the Louisville market.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

6 Q. State whether or not in 1894 the mines in which you were interested sold coal to local points in Kentucky at the same price at which they sold coal to Louisville. Did those mines lose money by selling coal to Louisville at the lower price? If not, why could they not have reduced their price to all local points to the Louisville price without losing money? Did the fact of the less charge to Louisville than to the local points injure the local points?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

117 Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

During 1894 I shipped coal from St. Charles mine, in western Kentucky, to Louisville, Ky., and to local points in Kentucky and Tennessee. I received from the local points more money for coal than I did from Louisville because the prices in Louisville were not under my control and I was compelled to receive a very small mar-

gin of profit in that market. In theory, each ton of coal mined costs a certain amount, and a reasonable amount added to this for profit makes the selling price of the coal on the railroad car at the mine. Each theoretical miner produces regularly a certain number of tons daily, and the theoretical customer buys this coal at the fixed price. But in practice how different, as many investors in coal-mining property discover when too late. The theoretical customer is never on hand, while certain fixed expense, such as pumping, feeding of stock, interest, salaries, etc., is always with us. The local trade only wants coal to any extent during five months of the year. This means only 140 days' work for the miner, and he should in equity get double the wages for the time worked. This means a large cost for producing the coal, which the local customer would have to pay if only local business were given this mine. This would be my condition at St. Charles mine but for the fact that I get low rates to Louis-
118 ville, Paducah, and Memphis, all competing points, all supplied with cheap coal. My business is largely increased by the demand of these markets, which want coal largely during the entire year. My miner works 250 days or more, instead of 140 days, and requires less wage. Pumping, mule feed, interest, and salaries are not necessarily increased by the increase of business; hence the cost of producing a ton of coal is much less than before, and my local customer, while paying me more for coal than does the Louisville or Paducah customer, gets his coal for much less than was possible had not these competitive markets been opened to me.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

7 Q. Explain how the cost per ton of producing coal was reduced by the mines having access to the Louisville market.

Objected to by the counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

Each coal-miner has a large, fixed expense outside of the wages paid his miners. The larger the tonnage produced up to the capacity of the mine, the amount of this fixed expense is reduced per ton. Louisville market consumes more than one-half the product of the St. Charles mine.

119 The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

8 Q. Did access to that market enable the mines to dispose of any grades of coal not marketable at local points? If so, what would have become of those grades of coal if access to the Louisville market had been denied?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

Access to the Louisville market enables me to dispose of the inferior grades of coal, such as nut and pea, and slack, that otherwise would be largely waste products. They are now sources of income instead of expense, as would be the case if the Louisville market should be taken from us, enabling us to sell cheaper coal.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

9 Q. In 1894 could the Louisville & Nashville Railroad Company have charged a higher rate from the mines at Altamont and other places in southeastern Kentucky to Louisville than it did charge? What would have been the result if it had been required to charge no higher rate for the transportation of coal from those mines
120 to Lebanon and other intermediate points than to Louisville? What would have been the result if the right to make the less charge to Louisville had been obtainable and revocable at the option of the railroad commission?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

The railroad company could not have charged a higher rate in 1894 from the mines at Altamont and other places in southeastern Kentucky to Louisville and have sold any coal in the Louisville market. To have required the railroad company to receive freight to Lebanon no higher rate than the rate charged Louisville would have resulted in raising the rates to Louisville, and thereby have prevented the transportation of coal from those places to Louisville. The same rule applies to transportation as to mining. Without the competitive business of such cities as Louisville, the miner would, as shown above, have to exist off the local trade with reduced tonnage, charging more for coal than when permitted to sell in Louisville, and with greatly increased tonnage. To charge the local trade the same price for coal as is received in Louisville would bankrupt the miner, and Louisville freight rate to all local
121 points would bankrupt the railroad company. If the right to make the less charge to Louisville had been obtainable at the option of the railroad commission (under the late ruling of our court of appeals), the entire coal industry of the State, involving all the capital invested therein, the thousands of people in the employ of the coal companies, and in fact the general prosperity of the State, would be wholly dependent upon the will of the commission for its success or failure. Arrangements for enlarging and improving plants would be discouraged, for the reason that it would be impossible to foresee what the railroad commission, as now constituted, or some future commission, might do with respect to allow-

ing coal to be hauled to competitive points like Louisville. The commission, as an independent proposition, might be willing to allow the mine operators and the railroad company to make these rates, yet the commission might be influenced by other considerations, such as a desire to coerce railroad companies to comply with the commissioners' views in other respects, on some matters entirely disconnected with the coal trade, and, as a matter of retaliation, withdraw the authority to charge less for the long haul, and thus most seriously injure the mining interests. The commission might, through ill will or prejudice against some particular mine-owner, or management of some railroad company, be influenced to withdraw such rates, or refuse in the first instance to allow it.

In fact the coal-mining interests of the State would be wholly dependent upon the views of any railroad commission that might be elected, and if the allowing or refusing of such rates was
122 left to the railroad commission, I would say that the coal-mining interests of the State would be in the greatest danger. At this time the coal business of the country has largely increased, and I am considering the propriety of increasing the output from St. Charles mine. This mine is on the Illinois Central railroad and 157 miles from Louisville. Other mines on this railroad are within 110 miles of Louisville. The recent decision of the court of appeals makes me doubt the advisability of spending the many thousands of dollars that the enlargement of the mine would require. The increased output would largely be shipped to Louisville.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

10 Q. What amount of capital is invested in southwestern Kentucky coal mines, and how many people are given employment by reason of the operation of those mines?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer said question, would answer truly as follows: Upwards of three millions of dollars is invested in the coal-
123 mining interests of western Kentucky; 5,000 men are given employment, supporting a population of 20,000.

The court still refused to permit the witness to answer the question or to so testify; to which the defendant, by counsel, excepted.

11 Q. Does competition in the business of transportation affect the policy or convenience of the carrier only?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

It does not. It affects many interests vital to the interests of the

State. In the illustration of two coal-mine operations, one 100 miles from the competitive market and the other 200 miles, should the latter be cut out of this market by an advance in rates, the consumer would lose the advantage of competition and generally be compelled to pay more for his coal, while the consumer between the mines and what was the competitive point would pay more also, for the cost of producing the coal would be greater, because of a smaller quantity produced. The competitive conditions which affect the transportation likewise affect the marketing of coal. The price of coal as well as the rate for its transportation are determined by just the same conditions. This is also true of competition in other lines of business.

124 The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

12 Q. In what way are the mine operators or coal consumers or the general public concerned with the cost to the carrier of transporting coal?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

I don't see that the mine operators or coal consumers or the general public can be in any way concerned with the cost to the carrier of transporting coal, because I do not understand that the cost of such transportation is ascertainable even by the carrier—at any rate, to such an extent as to make it an element which fixes or controls rates in actual practice. What the mine operators, coal consumers, and general public are concerned with is the rate of transportation and the elements which in practice fix that rate. These elements are ordinary business conditions, manifesting themselves in various ways of competition.

The court still refused to permit the witness to answer the question or to so testify; to which action of the court the defendant, by counsel, excepted.

13 Q. State whether or not in 1894 the Chesapeake & Ohio Southwestern Railroad Company charged more on coal from mines
125 along its line to points between those mines and Louisville than it charged from the same mines for the longer distance to Louisville.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

In 1894 the Chesapeake & Ohio Southwestern Railroad Co. did charge more for transporting coal from its mines to intermediate points between the mines and Louisville than to Louisville.

The court still refused to permit the witness to answer said ques-

tion or to so testify; to which action of the court the defendant, by counsel, excepted.

14 Q. Explain the circumstances and conditions affecting the transportation of coal in 1894 from Altamont and other southeastern Kentucky mines to Elizabethtown. Are those circumstances and conditions similar to or dissimilar from the circumstances and conditions affecting the transportation of coal from the same mines to Lebanon?

By Judge RIVES: To so much of this question as asks for circumstances and conditions other than those immediately affecting the cost of transportation the Commonwealth objects.

The court sustained said objection; to which the defendant, by counsel, excepted.

126 Thereupon counsel for the defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

In 1894 and since Elizabethtown, Kentucky, buys its coal from the mines at Altamont and other southeastern Kentucky mines, and from the mines on the Illinois Central railroad (the old Chesapeake & Ohio Southwestern Railroad Company), in western Kentucky, the western mines being considerably nearer and fixing the price, and the transportation from Altamont and other southeastern Kentucky mines was then and is now controlled by that competition.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

Counsel for the Commonwealth declined to cross-examine.

W. A. PUGH, called for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. HINES:

1 Q. Where do you live, what is your occupation, and how long have you been so engaged?

A. I live in Pittsburg, Laurel county, Ky.; my occupation is selling and shipping coal, in which I have been engaged for fifteen years last past.

2 Q. How, if at all, are the transportation of coal and the rate charged therefor by railroad companies connected with the coal trade itself?

127 Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The transportation and the rates charged therefor by railroads are connected with the coal trade itself, and all are influenced by the same conditions.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

3 Q. State to what extent, if at all, you are familiar with the transportation of coal between the mines in southeastern Kentucky and Lebanon and Louisville, and with the conditions of the coal trade at all of those places, and for how long have you been familiar therewith.

By Judge RIVES: We object to that part of the question in regard to the coal trade. We do not object to that part of the question which asks if he is familiar with the transportation of coal between the mines in southeastern Kentucky and Lebanon and Louisville, but we do object to that part which asks if he is familiar with the coal trade at those places, because that has nothing to do with the question.

By Mr. HINES: We ask the ruling of the court on the question as propounded.

128 By the COURT: Then I will overrule the motion, but I will have to control the witness in answering. Mr. Pugh, in making your response to that question you can answer so much of the question as to your familiarity and knowledge as to the transportation between points indicated in the question, but you will not give your knowledge as to the condition of the coal trade at the points indicated in the question.

To the ruling of the court the defendant, by counsel, excepted.

A. I am familiar with the transportation of coal between the mines in southeastern Kentucky and Lebanon and Louisville.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question fully, would answer truly as follows: And I am familiar with the conditions of the coal trade at all of these places and have been for the past fifteen years.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

4 Q. State whether or not in 1894 coal was or could have been transported from those mines or any of them to Louisville under circumstances or conditions similar to those under which it was transported from the same mines to Lebanon. What have been the facts in this regard since 1894? Explain fully.

129 Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows: In my opinion, coal could not have been transported to Lebanon from those mines under the same circumstances and conditions as it was transported to Louisville. The facts were that conditions and circumstances were not similar at the two points. The transportation of coal to Louisville was controlled by the competition

resulting from the coal brought down the Ohio river at very low rates, while no such condition affected the transportation to Lebanon. The price of coal at Louisville is absolutely fixed by the Pennsylvania and West Virginia coal coming down the Ohio river in barges, the cheapest method of transportation known. At proper stages of the river one boat sometimes brings down as many as 30 or 40 barges, each containing about 12,000 bushels of coal—that is, each barge contains as much coal as a fully loaded train of twenty cars can transport, the capacity of coal cars being 600 to 625 bushels each.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

5 Q. When did the southeastern Kentucky coal mines
130 begin shipping coal to Louisville, and under what circumstances and under what arrangement as to transportation, and what has been the effect of that arrangement?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

The southeastern Kentucky mines began shipping coal to Louisville in 1883. Circumstances which necessitated the shipment to Louisville were that the local market would not take the output. The effect of this arrangement was that we produced more coal at the same fixed charges. By placing our surplus coal in Louisville, domestic coal and lower grades, the miners got more steady employment and better pay and the number employed increased. This led to an increased demand for all sorts of supplies and farm products, much of which was furnished by the country along the line of the Louisville & Nashville road. For instance, a very considerable additional demand for flour and other mill products was thereby established, much of which was supplied by Lebanon mills.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

6 Q. What has been the effect of that arrangement upon the output of coal and its price to local points?

Objected to by counsel for the Commonwealth. Objection
131 sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would truly answer as follows:

It has very largely increased the output, and the price of coal has been cheapened to all points. In 1883 lump coal sold at the mines for $2.00 and $2.25 per ton. In 1894 the same coal sold at the mines from $1.00 to $1.25 per ton. This decrease could not have taken place except for the decreased cost per ton of production, re-

sulting from the increased output from our having access to the Louisville market.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

7 Q. In 1894, did the southeastern Kentucky coal mines charge the same for coal sold to Lebanon and other places similarly situated that they charged for coal sold to Louisville, and why? Did those mines lose money by selling coal at Louisville at a lower price; and, if not, why could they not have reduced the price to all local points to the Louisville price without losing money? Did the fact of the less charge at Louisville than to the local points injure the local points?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

132 Counsel for the defendant thereupon avowed that the witness, if permitted to answer the question, would answer truly as follows:

We charged the same for coal sold to Lebanon and other places similarly situated, but the coal sent to Louisville met competition, and we took what prices were obtainable, which were necessarily much lower. Despite the low prices obtainable at Louisville it was some advantage to dispose of our surplus there. We could not have sold coal at the same price to all local points as we got in Louisville from the fact that we would have lost money on our entire output had we done so. The fact of sending coal to Louisville under these conditions did not, in my mind, injure the local points. It did not increase the price they paid, but incidentally brought about a decrease in that price.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

8 Q. Explain how the cost per ton of producing coal was reduced by the mines having access to the Louisville market.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

133 By being enabled to put our surplus coal into Louisville a greater amount of coal was produced on the same fixed charges, and thereby it relatively reduced the cost per ton of the entire output.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

9 Q. Did access to that market enable the mines to dispose of any grades of coal not marketable at local points? If so, what would

have become of those grades of coal if access to the Louisville market had been denied?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

Access to that market enabled us to dispose of grades of coal not marketable except to a limited extent to local points. Had we not been able to have put this class of coal in the Louisville market we would have had to waste it.

The court still refused to permit the witness to answer the question or to so testify; to which action of the court the defendant, by counsel, excepted.

10 Q. In 1894, could the Louisville and Nashville Railroad Company have charged a higher rate from those mines to Louis-
134 ville than it did charge? What would have been the result if it had been required to charge no higher rate for the transportation of coal from those mines to Lebanon and other intermediate points than to Louisville? What would have been the result if the right to make the less charge to Louisville had been obtainable and revocable at the option of the railroad commission?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The Louisville and Nashville railroad could not have charged a higher rate from these mines to Louisville than it did charge. If it had charged a higher rate we could not have sent the coal there and met existing competition. The result of the railroad commission having the option of revoking rates at will would have destroyed any possibility of making contracts or selling coal in the Louisville market, because, as a business proposition, we could not rely on what the railroad commission might do in the future, especially since its action as to permitting lower rate on coal to Louisville would no doubt from time to time be controlled by the manner in which the railroads might comply or refuse to comply with other requirements of the commission about other matters, although, of course, as to those other matters the coal interests could have no voice.

135 The court still refused to permit the witness to answer the question or to so testify; to which action of the court the defendant, by counsel, excepted.

11 Q. What amount of capital is invested in the Southeastern Kentucky coal mines, and how many people are given employment by reason of the operation of those mines?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

The amount of capital invested in Laurel county will aggregate nearly half a million dollars. 3,500 people are employed by reason of the operation of these mines.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

12 Q. Does competition in the business of transportation affect the policy or convenience of the carrier only?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

No; it affects the producer and consumer as well.

136 The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

13 Q. In what way are the mine operators or coal consumers or the general public concerned with the cost to the carrier of transporting coal?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The mine operators or consumers are not concerned with the cost to the carrier of transportation, but are concerned with the business conditions which determine the rates. In practice I do not understand that the cost to the carrier of transporting coal is a business condition considered by it or capable of being considered in fixing the rate.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

Counsel for the Commonwealth declined to cross-examine.

C. S. NIELD, called for the defendant, being duly sworn, testified as follows:

Direct examination by Mr. HINES:

1 Q. Where do you live, what is your occupation, and how long have you been so engaged?

A. I am general manager of the North Jellico Coal Company, at Grays, Knox county, Kentucky. I opened said *said* mines

137 in 1888, and began shipping coal in February, 1889, and I have been general manager of said mines during and from that time. Before I took charge of North Jellico mines I was for

four years connected with the mines at Altamont, Laurel county, as treasurer and assistant manager.

2 Q. How, if at all, are the transportation of coal and the rates charged therefor by railroad companies connected with the coal trade itself?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer it truly as follows:

In conducting the mining and shipping of coal I have had much experience in obtaining and aiding in fixing rates. My outlet for coal has always been over the L. & N. railroad. The output of the North Jellico mines for 1897 was about 111,000 tons, and for 1898, about 232,500 tons. The output of coal mines depends upon many contingencies, such as the quality of, which creates a demand for it, the thickness of the strata, the facilities for mining, the prices paid to miners, &c., but the market for the output and finding a market, all other contingencies being favorable, is the greatest consideration for the operator, and to find a market the question of transportation rates must be closely studied and considered. If an operator in any section desires to sell coal at Winchester or Lexing-
138 ton, his first step would be to learn all the conditions prevailing at those points as to the price of coal as affected by cost of transportation over the L. & N. and the C. & O. If he learned that he could not put his coal into those places over the L. & N. with its existing rates as against the C. & O., he would see the L. & N. officials and urge such rates as would enable him to compete with the coal operators who shipped over the C. & O. Likewise, in shipping coal to Frankfort over the L. & N., he would have to get such rates as would enable him to compete with the river rates. Likewise, in shipping to Louisville the coal operators in southeastern Kentucky are forced to have such rates as will enable them to sell in competition with Ohio River rates.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

3 Q. State to what extent, if at all, you are familiar with the transportation of coal between the mines in southeastern Kentucky and Lebanon and Louisville, and with the conditions of the coal trade at all of those places, and for how long have you been familiar therewith.

By Judge RIVES: We object to that part of the question in regard to the coal trade. We do not object to that part of the question which asks if he is familiar with the transportation of coal between the southeastern Kentucky mines and Lebanon and Louisville, but we do object to that part which asks if he is familiar with the coal trade at those places, because that has nothing to do with the question.

139 By Mr. HINES: We ask the ruling of the court on the question as propounded.

By the COURT: Then I will overrule the motion, but I will have to control the witness in answering. Mr. Nield, in making your response to that question you can answer so much of the question as to your familiarity and knowledge as to the transportation between points indicated in the question, but you will not give your knowledge as to the condition of the coal trade at the points indicated in the question.

To the ruling of the court the defendant, by counsel, excepted.

A. For about fifteen years I have been familiar with the transportation of coal from mines in southeastern Kentucky to Lebanon, Louisville, and other points.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question fully, would further answer truly as follows:

I have hunted in person markets for the output from the North Jellico mines, and have kept in close touch with prices and rates at all accessible points for my coal for ten years.

The court still refused to permit the witness to answer the question, or to so testify; to which ruling of the court the defendant, by counsel, excepted.

4 Q. State whether or not in 1894 coal was or could have been transported from those mines, or any of them, to Louisville under circumstances or conditions similar to those under which it
140 was transported from the same mines to Lebanon. What have been the facts in this regard since 1894? Explain fully.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

I employ about 350 miners at North Jellico mines. They must have employment as much as possible or they cannot be kept together. It would be impossible to scatter them during spring and summer and then get them together to mine coal for winter sales. Therefore it is necessary to mine and ship coal during the hot and warm weather, and to do this a market must be found. This market for the southeastern Kentucky mines is in Louisville, which is the dumping ground for all our surplus coal. This surplus coal is thrown on the general and competitive market, the market being regulated by coal brought down the Ohio river in barges, which fixes the price for our coal. This surplus coal has to be sold at just such prices as prevail as the result of this condition, and unless the mines of southeastern Kentucky had this dumping ground at Louisville or elsewhere they would be forced to close operations, because the local demand at accessible non-competitive points in this State would not be sufficient to consume one-half of the output of my mine. At no time since I have been operating the North Jellico

mines could coal have been transported from southeastern Kentucky mines to Louisville under circumstances and condi-
141 tions similar to those under which it was transported to Lebanon from the same mines, for it could not be transported to Louisville unless the rate was made low enough to enable the coal to compete with the river coal, and no such condition affected its transportation to Lebanon.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

5 Q. When did the southeastern Kentucky coal mines begin shipping coal to Louisville, and under what circumstances, and under what arrangement as to transportation, and what has been the effect of that arrangement?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The first coal mines in southeastern Kentucky were on the Knoxville branch of the L. & N., at Livingston, then on the extension of the branch to Jellico. Mines were opened in Laurel and Whitley counties and at Jellico, in Tennessee, and when the Cumberland Valley branch was built mines were opened in Knox and Bell counties. The southeastern Kentucky mines first began to ship coal to Louisville in large quantities about 1883, and this shipping could only be done by the coal operators by their first getting a re-
duced rate, so as to enable them to compete with the then
142 existing river rates, the effect of which—I mean the *the* reduced rates of transportation—stimulated the coal output, the opening of mines, and development of coal lands. Prior to the extension of the Knoxville branch from Livingston to Jellico there were some small mines at Livingston and Pine Hill, whose output was mostly consumed by the local demand at interior Kentucky points. It was not until a market was opened in Louisville by reduced railroad rates that the operators from southeastern Kentucky were assured of a dumping ground for their surplus output. The output at the mines has greatly increased in the last few years, owing to the Louisville market being secured by reduced rates. This has led to the employment of many more miners and given them more steady employment, with the result that there has been greatly increased demand at the mines for all kinds of provisions and farm products, such as flour, corn, hay, etc., etc., which are largely supplied by such places as Stanford and Lebanon and the country adjacent to them and other points along the line of the Louisville and Nashville railroad between Lebanon and the mines. Moreover, this access to the Louisville market has led to a substantial decrease in the price of coal at Lebanon and other local points.

The court still refused to permit the witness to answer the ques-

tion or to so testify; to which ruling of the court the defendant, by counsel, excepted.

143 6 Q. In 1894 did the southeastern Kentucky coal mines charge the same for coal sold to Lebanon and other places similarly situated that they charged for coal sold to Louisville, and why? Did those mines lose money by selling coal at Louisville at a lower price; and, if not, why could they not have reduced their price to all local points to the Louisville price without losing money? Did the fact of the less charge at Louisville than to the local points injure the local points?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

In 1894 the mines in southeastern Kentucky did not charge the same prices for coal sold in Louisville as for coal sold in Lebanon and other points similarly situated, for the reason that the conditions prevailing and affecting the market in Louisville were not similar to those existing at Lebanon and other points similarly situated. The Louisville market was a dumping ground for surplus product, on account of the mines being able to ship there largely during the dull season, some of the mines usually carrying a large stock there. Prices obtained were very much lower than those prevailing elsewhere, on account of the competition of the river coal.

144 The fact that sales were very much increased in the Louisville market by the reduced price, and the trade would take inferior grades of coal, unsalable at interior points, enabled the mines to sell their coal at a less price than was charged elsewhere, without actual loss. Local points mostly use only the best grades of coal, and a mine to cater to such a demand must find a market for its lower grades. Lower prices already existed in Louisville, and the mines meeting those prices there had no effect on prices at local points, conditions not being the same, there being no competition such as existed at Louisville. Moreover, the price of coal sold to Lebanon or the other local points was not increased by selling the coal at Louisville at a lower price, but, on the contrary, access to the Louisville market tended to decrease the price at which coal was sold at those local markets.

The court still refused to permit the witness to answer the question or to so testify; to which action of the court the defendant, by counsel, excepted.

7 Q. Explain how the cost per ton of producing coal was reduced by the mines having access to the Louisville market.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The cost per ton of mining coal is actually reduced by
145 reason of the reduced rates to Louisville, and this enables operators to sell to dealers at Lebanon at a less price than if the rate to Louisville were not reduced. By being enabled to ship surplus output to Louisville, coal operators can keep their miners together, keep them at work, improve mining facilities, loading facilities, and take all steps necessary to reduce the cost of the output to the lowest possible price. This could not be done unless the mines had access to the Louisville market at rates to compete with river rates.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

8 Q. Did access to that market enable the mines to dispose of any grades of coal not marketable at local points; if so, what would have become of those grades of coal if access to the Louisville market had been denied?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

Certain grades of coal are marketed in Louisville which could not be marketed at interior local points and would be a loss to the operator unless a market like Louisville, requiring large quantities of different grades of coal, could be found.

146 The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

9 Q. In 1894 could the Louisville & Nashville Railroad Company have charged a higher rate from those mines to Louisville than it did charge? What would have been the result if it had been required to charge no higher rates for the transportation of coal from those mines to Lebanon and other intermediate points than to Louisville? What would have been the result if the right to make the less charge to Louisville had been obtainable and revocable at the option of the railroad commission?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The Louisville and Nashville Railroad Co. could not in 1894 have charged a higher rate than it did charge from those mines to Louisville. If required to charge as much to Louisville as to Lebanon, the mines would have lost the Louisville market. If the right to fix rates were in the hands of railroad commissioners, I, as an operator, would not feel safe in my business, as I would not know what views varying commissioners have. It would put the
147 entire investment in coal mines in *in* Kentucky under the charge of the commission, as the right to get into the Louis.

ville market is indispensable to the prosperity of the Kentucky mines.

I wish to say that the coal operators know their business and calling, and they are always hunting markets and trying to get the lowest possible rates. I am of opinion that rates to Lebanon cannot be reduced to the rates now given coal operators to Louisville. If a change be made so as to adjust matters, rates to Louisville will have to be raised to Lebanon rates. This will ruin the coal operators and place the coal trade in southeastern Kentucky in the hands of the Jellico mines in Tennessee, and drive Kentucky operators into closing their mines. Such is my opinion.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

10 Q. What amount of capital is invested in the southeastern Kentucky coal mines, and how many people are given employment by reason of the operation of those mines?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

148 A very large amount of capital is invested in southeastern Kentucky coal mines and several thousand persons employed and sustained by them.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

11 Q. Does competition in the business of transportation affect the policy or convenience of the carrier only?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

Competition in rate of transportation not only affects the carrier, but also affects the operator and the public generally, as heretofore stated.

The court still refused to permit the witness to so testify or to answer the question; to which ruling of the court the defendant, by counsel, excepted.

12 Q. In what way are the mine operators or coal consumers or the general public concerned with the cost to the carrier of transporting coal?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The mine operators, coal consumers, and general public
149 are concerned with the rates of a railroad company and with the elements determining those rates. Those elements are the various commercial conditions giving rise to different sorts. I do not think the cost to the carriers of transporting coal could be used by the carrier as the basis of its rates, as that is an unknown quantity even to the carriers, there being so many elements involved. It is not, therefore, a matter of any concern to the mine operators, coal consumers, or general public.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

Counsel for the Commonwealth declined to cross-examine.

And this was all the testimony offered by either party or heard by the court and jury upon the trial of this cause.

The defendant thereupon moved the court to instruct the jury peremptorily to find for the defendant, on the ground that section 218 of the constitution of Kentucky and section 820 of the Kentucky statutes, as construed by the court, are contrary to the Constitution and laws of the United States, and therefore void, in that they operate to deprive the defendant of its property without due process of law, and to deny it the equal protection of the law, contrary to section 1 of article XIV of the amendments to the Constitution of the United States, and to impair the obligation of
150 the defendant's contract with the Commonwealth of Kentucky, contrary to subsection 1 of section 10 of article 1 of the Constitution of the United States, and would operate to regulate commerce among the several States, contrary to subsection 3 of section 8 of article 1 of the Constitution of the United States, and in conflict with the act of Congress of February 4th, 1887, entitled An act to regulate commerce; but the court decided against each and all of said contentions of the defendant, and decided in favor of the validity of said section 218 of the constitution of Kentucky and section 820 of the Kentucky statutes; to which ruling of the court and to each and every part thereof the defendant at the time excepted and still excepts.

Thereupon the Commonwealth moved the court to give to the jury instructions Nos. 1, 2, and 3; to the giving of each of which instructions the defendant objected; but the court overruled the defendant's objections and gave all of said instructions, and to the ruling of the court in giving each of said instructions the defendant excepted and still excepts. Said instructions are as follows:

No. 1. The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, The Louisville and Nashville Railroad Company, a common carrier and a corporation organized under the laws of this State, operating in this State a line of road extending from Altamont, in this State, through the county of Marion and city of Lebanon, to Louisville, in
151 this State, did, in the county of Marion, within 12 months next before the finding of the indictment herein, to wit, on October 17th, 1894, did transport a car-load of coal from Altamont,

Ky., to Lebanon, Ky., over its said line of road for one J. M. Shreve, and did then and there charge and receive from the said J. M. Shreve, as compensation for the transportation of said car-load of coal, twenty-nine and fourteen one-hundredths dollars ($29.14), being at the rate of one and fifty five one-hundredths dollars ($1.55) per ton, when for the transportation of a similar car-load or car-loads of coal under substantially similar circumstances and conditions for a longer distance over the same line of road, namely, from Altamont, Ky., to Louisville, Ky., and to Elizabethtown, Ky., in the same direction, the distance from Altamont, Ky., to Lebanon, Ky., being shorter and included within the longer distance from Altamont, Ky., to Louisville, Ky., and Elizabethtown, Ky., and that the said defendant at said time did charge or receive less compensation than $1.55 per ton from various persons or from any person at said Louisville, Ky., and Elizabethtown, Ky., the defendant at said time not having been authorized by the railroad commission of this Commonwealth to charge less for a longer than for a shorter distance for the transportation of said coal, they will find the defendant guilty as charged in the indictment and fix the penalty at a fine of not less than $100.00 or more than $500.00.

No. 2. If the jury have a reasonable doubt of the defendant having been proven guilty, they will find the defendant not guilty.

152 No. 3. The jury are instructed that in determining whether two or more car-loads of coal are transported under substantially similar circumstances and conditions when one is transported for a longer distance over the same line of road than for a shorter distance in the same direction, the shorter distance being included within the longer distance, they should consider only such circumstances and conditions as relate to the nature and character of the service performed by the defendant in the actual handling and movement of the coal transported.

The Commonwealth offered no other instructions, and the foregoing are all the instructions asked, given, or refused on the trial.

And the jury having heard the instructions of the court and the argument of counsel, and having retired to consider their verdict, returned into court the following verdict:

"We of the jury find defendant guilty and fix the fine at $300.00."

And judgment having been rendered against the defendant upon said verdict and the defendant having filed its written motion to set aside said verdict and judgment and grant it a new trial herein, together with written grounds for said motion, and the court having overruled the same and an appeal having been granted the defendant to the court of appeals, this bill of

153 exceptions has been tendered in court and has been examined and approved and is hereby made a part of the record.

CHAS. PATTESON,
J. M. Cir. Ct.

Filed in court February 3rd, 1889.

B. J. LANCASTER, *Clerk.*

Supersedeas Bond.

STATE OF KENTUCKY, }
Marion County. }

Marion Circuit Court.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant, }
vs. }
COMMONWEALTH OF KENTUCKY, Appellee. }

Upon appeal from a judgment of this court rendered 25th January, 1899.

In indictment No. 505.

Whereas said appellants have taken an appeal from the judgment of this court rendered on the 25th day of January, 1899, against appellant in favor of the appellee for the sum of ($300.00) and costs, which judgment is in words and figures as follows: It is therefore adjudged by the court that the Commonwealth recover of the defendant the sum of three hundred dollars and its costs herein expended, for which execution may issue, and the appellant desires to supersede said judgment:

Now, we, H. W. Bruce, surety, do hereby covenant to and with the appellee, Commonwealth of Ky., that the appellant will pay to the appellee all costs and damages that shall be adjudged
154 against the appellant on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed, and any judgment or order which the court of appeals may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid, and also pay all damage which during the pendency of the appeal may accrue by reason of the appeal.

Witness our hands this 6th day of Febr'y, 1899.

H. W. BRUCE,
By W. J. LISLE,
Attorney-in-fact.

Attest: B. J. LANCASTER, *Clerk.*

Filed and supersedeas issued 6th day of February, 1899.
B. J. LANCASTER, *Clerk.*

Whereas the Commonwealth of Kentucky has recovered a judgment for three hundred dollars (300.00) and interest and costs against the Louisville and Nashville Railroad Company, at the January term, 1899, of the Marion circuit court, in the action therein of Commonwealth of Kentucky, plaintiff, and The Louisville and Nashville Railroad Company, defendant, # 505; and

Whereas said defendant has prayed an appeal from said judgment to the court of appeals of Kentucky:

I, H. W. Bruce, of the city of Louisville and State of Kentucky,

hereby authorize W. J. Lisle, of the city of Lebanon and county of Marion, as my attorney-in-fact, to execute and sign my name
155 to the necessary appeal and supersedeas bond in behalf of said Louisville & Nashville Railroad Company for the purpose of superseding said judgment pending said appeal.

Witness my hand this 3rd day of February, 1899.

H. W. BRUCE.

Witness:
E. C. TURNER.

Marion Circuit Court.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } No. 505. Long and Short Haul.

Copy for defendant for court of appeals, indictment on which this case was tried, all papers filed since then, and all orders of court and bill of exceptions, omitting all papers and pleadings on change of venue herein.

W. J. LISLE,
Att'y L. & N.

Filed with the clerk Feb'y 21st, 1899.

B. J. LANCASTER, *Clerk.*

156 COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO., Defendant. } *sct:*

I, B. J. Lancaster, clerk of the Marion circuit court, hereby certify that the 156 foregoing pages contain a full, true, and complete copy of a record in the Marion circuit court, omitting only a motion for a change of venue and such pleadings as were filed and orders made on said motion, in which the Commonwealth of Kentucky is plaintiff and The Louisville and Nashville Railroad Company is defendant, which case is numbered "505," as is shown by the records on file in my office.

Given under my hand this 21st February, 1899.

B. J. LANCASTER,
Clerk Marion Circuit Court.

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH, Appellee. }

Judgment appealed from rendered at January term, 1899, of Marion circuit court and copied on pages 13 and 17 of transcript. Appeal granted below.

H. W. BRUCE,
WALKER D. HINES,
For Appellant.

157 At a court of appeals held in and for the Commonwealth of Kentucky, at the capital, in Frankfort, on the 24th day of March, 1899, the following order was entered:

"Marion Circuit Court.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee. } (# 505.)

On motion of appellant and by consent of the parties, by counsel, this cause is ordered to be set for oral argument on April 18, 1899."

Afterwards, on the 18th day of April, 1899, the following order was entered of record herein:

"This cause, coming on to be heard, was argued by W. D. Hines, for appellant, by W. S. Pryor, for mine-owners, and by H. W. Rives, for appellee, and laid over for further argument."

Afterwards, on the 19th day of April, 1899, the following order was entered of record herein:

"This cause, coming on for further hearing, was argued by Wm. Lindsay, for appellant, and is submitted."

158 And afterwards, on the 20th day of May, A. D. 1899, the following judgment was entered herein:

"LOUISVILLE AND NASHVILLE Railroad Company, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee. } (# 505.) Appeal from Marion Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that the appellee recover of appellant ten per cent. damages on the amount of the judgment herein superseded, which is ordered to be certified to said court, the whole court considering the case. Judges Burnam and Du Relle dissenting.

It is further considered that the appellee recover of appellant its cost herein expended."

On the same day the court, through Judge Hobson, delivered the following opinion herein, which is as follows:

159 "Kentucky Court of Appeals.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.

Opinion of the Court by Judge Hobson.

Section 218 of the constitution is as follows:

'It shall be unlawful for any person, or corporation owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person, or corporation owning or operating a railroad in this State to receive as great compensation for a shorter as for a longer distance: Provided, that upon application to the railroad commission such common carrier, or person, or corporation owning or operating a railroad in this State, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this State, may be relieved from the operation of this section.'

To carry the above into effect the General Assembly enacted the following statute:

160 'If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin circuit court, or the circuit court of any county into or through which the railroad or common carrier, so violating, runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, the railroad

or common carrier shall not be prosecuted or fined on account of the complaint made.

'If the commission after investigation, fails to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any
161 county, the circuit court of which has jurisdiction, in order that the railroad or common carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or common carrier is indicted and prosecuted.'

(Kentucky Statutes, section 820.)

Appellant transported coal from Altamont to Louisville at $1.00 per ton, and to Elizabethtown at $1.30 per ton, while it charged $1.55 per ton from Altamont to Lebanon, an intermediate station on its line of road. Complaint being made to the railroad commission, it investigated the matter and made an order in writing declining to exonerate appellant from the operation of the provisions of the section above quoted, and thereafter, at the suggestion of the commission, appellant was indicted in the Marion circuit court as provided in the statute. The case was tried, and appellant having been adjudged guilty, it prosecutes this appeal to reverse the judgment imposing a fine upon it of $300.

Appellant justified the difference of the rate on the ground that at Louisville the coal hauled from Altamont came in competition with the coal brought down the Ohio river on boats, and that at Elizabethtown it came in competition with the western Kentucky coal brought there by the Illinois Central railroad. It insists that these rates could be made no higher on account of this competition, and that the rates to non-competitive points like Lebanon were reasonable and were unaffected by the reduction referred to, which were necessary for the coal to be handled in those markets at all. The evidence offered by it to sustain this contention was excluded by the court below on the trial on the ground that competition is not one of the circumstances or conditions exempting the railroad from the operation of section — of the constitution above quoted.
162 It is earnestly argued for appellant that the transportation is not under substantially similar circumstances and conditions when competition exists at one point and not at another, and we are referred to numerous decisions of the Federal courts so holding. On the other hand, it is contended for the State that to adopt this construction is to emasculate the section and deprive it of all practical operation and effect.

The precise question thus presented was determined by this court in the case of Louisville & Nashville Railroad *vs.* Commonwealth, 20 Ky. Law Reporter, 1380, where the construction of the section adopted by appellee was sustained. We are urged to overrule that

case; but it was fully considered and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation.

It is insisted for appellant that this construction of the section makes it an arbitrary interference with the right of appellant to engage in competitive traffic, depriving it of its property without due process of law, denying it the equal protection of the law, impairing the obligation of its charter contract, and unlawfully interfering with interstate commerce. All of these objections may be considered together.

A railroad is only an improved modern highway. It must of necessity be subject to public control like its predecessor, the turnpike, for the industry and commerce of the country are dependent upon it. To hold that only railroad men understand rates, or that they shall be allowed alone to fix the rates, and that no tribunal can review their decision as to what rates are reasonable is to put in their hands a power dangerous to the welfare of the community and utterly out of keeping with the doctrine that they are
163 public agencies, and so have the right to appropriate to their use the property of the citizen against his consent, upon making him just compensation.

It has been notorious that railroad managers have by discriminations in favor of certain shippers or a given locality brought ruin to others. It was the aim of the constitution to require the railroads in the State to treat all localities fairly and with equality; but as differences of conditions ever varying would constantly arise, it prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people, and decide when and to what extent a greater charge might be made for a short than for a long haul, under like circumstances and conditions, with full power, in special case, 'from time to time, (to) prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State may be relieved from the operations of this section.' It is not confined in its power to each shipment as it may be made, but may prescribe from time to time a suspension of the section on freight of a given character between given points as the public interest and the ends of justice may require.

We are unable to see that as yet any right of appellant has been invaded or that it has any just cause of complaint. If it be true that the public interests require the discrimination in rates shown in this case, and that no injustice has really been done, it may be that upon presentation of the facts to the railroad commission it would allow the rates to stand and make an order exonerating appellant from the operation of the section.

It does not appear that appellant had presented its case to the railroad commission, and we infer that it has not done so from the fact that this case seems to have been specially prepared to
164 present these questions here, and there is no reference to a similar effort before the railroad commission. Although the commission refused to exonerate appellant on the evidence it had

before it, it does not follow that it would still refuse to do so if proper evidence was offered. It represents the whole State, including the railroad and its stockholders, as well as other people, and has always shown a laudable zeal for the interest of the entire State. The power to determine this matter must be vested somewhere, and the constitution having created a special tribunal for this purpose, we cannot see that its provisions are subject to any of the objections raised by appellant.

If the railroad companies are not to be allowed to have exclusive control over the rates for the long and short haul and the sole right to determine when competition exists and to what extent special rates for this reason may be given, we do not see any more just arrangement that can be made than the selection of an impartial tribunal to hear and determine the matter. Since Adam's first-born dyed his hands in his brother's blood self-interests have warped and controlled human judgment.

However honest and faithful railroad managers may be, they necessarily look first to the interests of those they serve, and no principle of constitutional law is violated when the State, which has created these agencies for the public service, creates an impartial tribunal to prevent their great powers from being used to build up certain favored ones at the expense of others.

Counsel for appellant, in effect, concede in their brief that the State may prevent unjust discrimination, and that if appellant's rates are judicially determined not to be reasonable it may then be punished.

Their argument, in effect, is that appellant may be pun-
165 ished under the section of the constitution, although its rates are reasonable and the discrimination is made necessary by competition in trade, over which it has no control. This assumes that the railroad commission will allow the interests of the State to suffer from an unjust rule, or that it will do injustice to appellee.

We cannot see that a jury is either better qualified to pass on the reasonableness of a rate than a skilled commission, nor is it by any means sure that a trial by jury would be in practice any more satisfactory to appellee. It is true the commission may make mistakes, but we see no reason for the apprehension that an impartial tribunal will err more to the prejudice of one of the parties to a controversy than that party might himself to the prejudice of the other if the solution of the question were left to him alone. It may be the commission, on the complaint referred to, from the evidence before it, concluded that the rate to Louisville was as large as it should be to afford a fair competition for the haul to Lebanon, or that the competition with another railroad in the State did not justify the discrimination in favor of Elizabethtown. If it erred in any of its conclusions it has power, from time to time, on further evidence and a fuller hearing, to make such orders as the ends of justice may require, and if the State may control the matter at all we cannot see that the plan proposed is unfair or in excess of the rightful police power of the State.

It is urged that this construction of the constitution will allow coal and other freights from without the State to be shipped cheaper

than they can be hauled to the same point if shipped within the State, as under the interstate-commerce act competition is held to exclude the carrier from the long and short haul clause.

166 The constitutional convention, no doubt, had just such considerations in mind when it gave the railroad commission the plenary powers conferred on it as above explained. It is the duty and, no doubt, will be the pleasure of the railroad commission to so regulate the matter that no injustice shall be done any industry in the State and the true interests of the Commonwealth as a whole shall be promoted.

The interstate-commerce act, under the construction that has been given it, has proved a sore disappointment to many of its friends. The subject is new. That act was an experiment; the provision of our constitution is an experiment in another direction.

The subject is one of great difficulty, and if experience does not find our provision to bring just results it may lead to that system which will do justice to all and bring these intricate questions to a just and fair settlement.

Judgment affirmed.

Judges Du Relle and Burnam dissent."

And afterwards, on the 23rd day of May, 1899, the following order was entered of record therein, viz:

"Came appellant, by counsel, and on motion the issuing of mandate therein is suspended thirty days."

And afterwards, on the 17th day of June, 1899, the following order was entered of record herein, viz:

"Chief Justice Hazelrigg noted his dissent to the opinion herein, and delivered a dissenting opinion herein, in which Judges Du Relle and Burnam concur."

Said dissenting opinion is as follows, viz:

167 "It is not disputed that at the time of the incorporation of the long and short haul clause of the act of Congress into the Kentucky constitution of 1891 the settled construction of that clause by the tribunal charged with its enforcement, as well as the construction of the same clause by the Federal courts theretofore called on to construe it, was the same as was subsequently adopted by the Supreme Court of the United States.

When this court, therefore, came to construe the clause, it had before it the decision of the question at issue by the Supreme Court of the United States and the decisions of numerous other Federal courts, all agreeing that competition was a controlling factor in the adjustment and regulation of rates, and that its presence and influence conspired to make the 'circumstances and conditions' of shipments substantially dissimilar from shipments where such competition did not exist.

I insisted then, as I do now, that it ought to have been assumed as indisputable that when the framers of the constitution took the pains to copy the Federal law on the subject involved they expected

the same construction to be put on the borrowed language as had theretofore been put on the law from which they borrowed.

Indeed, the ordinary rules of construction required the adoption of the views of those courts which had already construed the law when we incorporated it into our law.

This court has again and again announced the principle that by borrowing the law from a given source we borrow its construction as well. Instead of departing from this settled rule there are controlling and peculiar reasons affecting the regulation of common carriers why the principle adverted to should be adhered to.

168 The carriers to whom the law was to be applied were, in the main, interstate carriers, and were making their shipments into and out of the State under traffic rates adopted to meet the construction of the long and short haul clause by the Federal courts.

Our law-makers must have foreseen that the same law should control all classes of shipments, else there was danger of gross discrimination against the interests of our own people. Concretely put, the question before them was, shall the mine-owners of Jellico, Tennessee, have access to the trade centers of the State of Kentucky at the cheap competition rate, whilst the output of mines at Jellico, Kentucky, a few hundred yards off, shall be limited to the local demand and be shut out of the larger market because of the higher and non-competitive rates?

The answer was such as it ought to have been.

The law-makers agreed to adopt even the ambiguous and awkward phraseology of the Federal—the interstate—law, to the end that whatever might be the construction of the law, at least, it must, according to well-settled rules, be the same construction whether applied by the State or by the Federal tribunals.

I venture to say that it never entered the mind of our law-makers that this law would receive a construction radically different from the construction put on it by the Federal courts, and certainly not if this different construction must result to the disadvantage of intrastate traffic.

It is not amiss to say here that a departure from this well-settled rule has already inflicted irreparable loss on the coal interests of the State in the locality where the question has arisen, and the construction will continue to embarrass and delay development of the great forests and mines of eastern and southeastern Ken-

169. tucky. Aside from all this, there is a more serious question involved.

Under the law as construed by the majority opinion the company must:

1. Increase its rates from the Kentucky mines to Louisville beyond the rates fixed to Lebanon; or

2. Decrease the rates from the mines to Lebanon below those charged to Louisville; or

3. Depend on the arbitrary will of the railroad commissioners to adjust the rates as to them may seem proper.

If the first alternative is forced on the company the result is a

prohibition of the carriage of coal from the mines to Louisville, as none could be sold there. This result would be confessedly an unwarrantable interference with the reasonable use of the company's property.

If the second, then the company is forced to furnish the use of its property at a price below that which is reasonable and at rates below those which afford a fair and just return on the capital invested.

This is true because it is to be assumed that the rates from the mines to Lebanon are already reasonable and just.

The proof offered is conclusive on this point.

The only remaining refuge of the company is to submit its management to the arbitrary will of the commissioners.

And this, say this court, in effect, is better than to leave the matter at issue to a jury.

I think the court overlooks the fact that a jury must act within the rules of law. A trial before a jury is had under the ordinary forms of law. The judge and jury are at least controlled and bound by legal principles and precedents. I think, in the
170 first place, neither Congress nor the constitutional convention ever intended to vest these respective boards of commissioners with such extraordinary and arbitrary power; and, in the second place, I think the law so construed would result in an unwarrantable interference with the reasonable use of the appellant's property and to an extent not permissible under either the State or Federal Constitutions.

In the recent case of The Lake Shore and Michigan S. R'y Co. *v.* Smith, 19 Sup. Ct. Rep., 565 (April 17, 1899), the principle is emphasized that the power of the State in the matter of regulating railroads is to be exercised in subordination to the Federal Constitution, and that railway companies have a constitutional right to manage their own properties subject only to the exercise by the State of a reasonable supervision.

To say that as yet the company is not hurt because the commission will 'do right' is but begging the question. Such a construction results in the substitution of a tribunal to try the property rights of the company which is restricted by no legal safeguards.

The statute so construed is clearly in conflict with the Constitution of the United States. In C., M. and St. P. R'y Co. *v.* Minnesota, 134 U. S., 418, the Supreme Court said: 'This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that so construed it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a
171 matter in controversy, and substitutes therefor as an absolute finality the action of a railroad commission, which, in view of the powers conceded to it by the court, cannot be regarded

as clothed with judicial functions or possessing the machinery of a court of justice.'

Without elaboration, I respectfully dissent from the opinion of the majority and refer to the former dissenting opinion in the same matter as indicating my view in detail of the real meaning and purpose of the statute.

Judges Du Relle and Burnam concur."

On the 28th day of June, 1899, the appellant and plaintiff in error filed in the office of the clerk of the court of appeals its writ of error (a copy of which remains on file in said clerk's office), as follows:

172 UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Louisville & Nashville Railroad Company, appellant, and The Commonwealth of Kentucky, appellee, wherein was drawn in question the validity of a statute or constitution of or an authority exercised under said State of Kentucky, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution (or of a statute) of the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution (or statute), a manifest error hath happened, to the great damage of the said Louisville & Nashville Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States *shall* be done.

Seal 6th Circuit Court Ky. Dis., U. S. of America.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of June, in the year of our Lord one thousand eight

hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-third.

THOS. SPEED,
Clerk of the Circuit Court of the United States
for the District of Kentucky,
By HENRY F. CASSIN,
Deputy Clerk.

Allowed by—
J. H. HAZELRIGG,
Chief Justice of the Court of Appeals of Kentucky.

[Endorsed:] 1899, June 28, filed. Att.: S. J. Shackelford, C. C. A.

173 On the same day, to wit, June 28, 1899, the plaintiff in error filed in said clerk's office its bonds, together with the power of attorney, as follows:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Know all men by these presents that the Louisville & Nashville Railroad Company, principal, and J. M. Atherton, surety, are held and firmly bound unto the Commonwealth of Kentucky in the sum of $1,000.00, to be paid to the obligee herein; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 28th day of June, 1899.

Whereas the above-named Louisville & Nashville Railroad Company has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the court of appeals of Kentucky:

Now, therefore, the condition of this obligation is such that if the above-named Louisville & Nashville Railroad Company shall prose-
174 cute its said writ of error to effect, and, if it shall fail to make good its plea, answer the whole amount of the judgment therein, including just damages for delay and all costs and interest, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, [L. S.]
By WALKER D. HINES, *Attorney.*
J. M. ATHERTON, [L. S.]
By WALKER D. HINES, [L. S.]
Attorney-in-fact.

Sealed and delivered in the presence of and approved by—
J. H. HAZELRIGG,
Chief Justice of the Court of Appeals of Ky.

Court of Appeals of Kentucky.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Whereas the above-named Louisville & Nashville Railroad Company has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the court of appeals of Kentucky:

Now, therefore, know all men by these presents that, in order to supersede the said judgment pending said prosecution and determination of said writ of error, I, J. M. Atherton, do hereby appoint and constitute Walker D. Hines as my attorney-in-fact to
175 sign my name as surety to the necessary bond to the Commonwealth of Kentucky in the sum of one thousand dollars ($1,000), conditioned that if the Louisville & Nashville Railroad Company shall prosecute its said writ of error to effect, and, if it shall fail to make good its plea, shall answer the whole amount of the judgment therein, including just damages for delay and all costs and interest, then said bond is to be void; otherwise the same shall be and remain in full force and effect.

Witness my hand and seal the 16th day of June, 1899.

J. M. ATHERTON. [L. S.]

Witness:
J. H. ELLIS.

On the same day, to wit, June 28, 1899, the plaintiff in error filed its assignment of errors in said clerk's office as follows:

176 Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.
} Assignment of Errors.

The Louisville & Nashville Railroad Company, plaintiff in error in the above-entitled cause, complains of the judgment rendered therein by the court of appeals of Kentucky, and for error therein assigns the following:

First. The court erred in affirming the judgment of the Marion circuit court, whereas it should have reversed the same, with directions to grant the plaintiff in error herein a new trial, whereon said plaintiff in error could make the defense under the Constitution and laws of the United States, which were set up by it in the record herein, but which were excluded by the court.

Second. The court having held in substance and effect that section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes absolutely and arbitrarily prohibit a railroad company or other common carrier in Kentucky charging more for

the transportation of passengers or property for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, under any circumstances whatever, except where the cost to the carrier of the longer haul may be actually less than the cost to the carrier
177 of the shorter haul, saving only an arbitrary power in the railroad commission to permit less charge for such longer hauls in special cases, the action of the commission being final and conclusive and without power of judicial review, erred in holding that neither of said sections, so construed, is repugnant to section 1 of article XIV of the amendments to the Constitution of the United States, in that each of them so construed in effect deprives the carrier of his property without due process of law, and denies to it the equal protection of the law.

Third. The court having held in substance and effect that said section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes absolutely and arbitrarily prohibit railroad companies or other common carriers in Kentucky charging more for the transportation of passengers or property for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, although said charge for the shorter distance may be just and reasonable, and on precisely the same basis as the charges for the hauls not happening to be on the line of the given long haul, and without requiring any reduction in the rates for such other hauls below the legal maxima already allowed by law, thereby unreasonably discriminating in favor of the shorter distance of such long haul, and against similar distances not happening to be on that long haul, erred in holding that neither of said sections so construed is repugnant to the Constitution of the United States, although, so construed, they
178 are and each of them is necessarily repugnant and in conflict with section 1 of article XIV of the amendments to the Constitution of the United States, in that each of them in effect deprives the carrier of its property without due process of law, and denies to it the equal protection of the law.

Fourth. The court having construed said section 218 of the constitution of Kentucky and said section 820 of the Kentucky Statutes, as above stated in second and third assignments, erred in holding that neither of said sections so construed is repugnant to subsection 1 of section 10 of article 1 of the Constitution of the United States, in that each of them, so construed, impairs the obligation of the contract between the plaintiff in error and the Commonwealth of Kentucky resulting from the acceptance by said plaintiff in error of the charter granted to it by the Commonwealth of Kentucky, whereby the plaintiff in error had and has a contract right to engage in and receive revenue from all forms of legitimate railroad traffic, subject only to such reasonable regulations as may be imposed by the State in the reasonable and proper exercise of its police power.

Fifth. The court, having construed said section 218 of the constitution and said section 820 of the Kentucky Statutes as above

stated, erred in holding that neither of said sections so con-
179 strued is repugnant to subsection 3 of section 8 of article 1 of the Constitution of the United States and in conflict with and repugnant to the act of Congress of the United States of February 4, 1887, entitled "An act to regulate commerce," in that each of said sections so construed in effect regulates and unlawfully interferes with commerce among the States.

Sixth. The court, having given section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes a construction making them and each of them repugnant to the aforesaid provisions of the Constitution of the United States and the aforesaid act of the Congress of the United States, erred in holding that said section of the constitution and said section of the Kentucky statutes so construed to be valid, notwithstanding such repugnancy.

Seventh. The court erred in deciding against the title, right, and privilege specially set up and claimed by the plaintiff in error under the aforesaid provisions of the Constitution of the United States, and each of them, and under the aforesaid act of the Congress of the United States.

Eighth. The court erred in rendering the judgment sought to be reversed because it is contrary to the law of the controversy and in opposition to the rights of the said plaintiff in error secured to it by the Constitution and laws of the United States.

Wherefore it prays for a reversal of said judgment.

WILLIAM LINDSAY,
WALKER D. HINES,
For Plaintiff in Error.

180 COMMONWEALTH OF KENTUCKY, *Court of Appeals,* } *set:*

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, hereby certify that the preceding one hundred and seventy-nine pages contain a true and complete transcript of the record and proceedings had in said court of appeals on the appeal of The Louisville and Nashville Railroad Company, appellant, *vs.* The Commonwealth of Kentucky, appellee, together with the original writ of error (a copy of which is on file in my office), a copy of the bond, and assignment of errors; all of which appears of record and on file in my office.

Seal Kentucky Court of Appeals.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 29th day of June, A. D. 1899.

SAMUEL J. SHACKELFORD,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $55.00.

181 UNITED STATES OF AMERICA:

The President of the United States to the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Louisville & Nashville Railroad Company is plaintiff in error and The Commonwealth of Kentucky is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Hazelrigg, chief justice of the court of appeals of Kentucky, this 28th day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

J. H. HAZELRIGG,
Chief Justice of the Court of Appeals of Kentucky.

Service of this citation is hereby accepted, June 28, 1899.

COMMONWEALTH OF KENTUCKY,
By W. S. TAYLOR, *Attorney General.*

Endorsed on cover: File No., 17,457. Kentucky court of appeals. Term No., 343. The Louisville & Nashville Railroad Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed July 7th, 1899.